UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN THE MATTER OF,

CITY OF DETROIT, MI
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Case No. 13-53846
Detroit, Michigan
September 3, 2014
8:30 a.m.

IN RE: TRIAL
BEFORE THE HONORABLE STEVEN W. RHODES
TRANSCRIPT ORDERED BY: ROBIN WYSOCKI

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(Court in Session)

THE CLERK: All rise. Court is in session. Please be seated. Calling case number 13-53846, City of Detroit, Michigan.

THE COURT: Good morning. I think rather than take the time to take appearances, we'll just assume everyone's here. Raise your hand if you're not here. Mr. Bennett.

MR. BENNETT: Thank you, Your Honor. Bruce Bennett of Jones, Day on behalf of the City of Detroit.

Where we left off yesterday we were discussing the best interest test. And in particular whether the city had any ability to raise taxes and thereby generate more revenue as opposed to harm itself by either continuing the downward spiral that the city is already in, or making that situation worse.

And then immediately when we left I was talking about the fact that there's a competitive -- in addition to the cases that talk about avoiding downward spirals, and I think necessarily by the need to address downward spirals, there is a competitive dimension that a municipality has to worry about and that the Court has to worry about for a city that's in a challenging position relative to its tax rates being charged to residents and the services that are -- that it's providing. That's just reality.

And as a result of these what I'll call facts on the

ground, or the here and now, as opposed to projections and speculations and the so-called dismissal analysis. The city's debt can demonstrate, and I think will demonstrate quite easily during the trial but it also, I'd point out, has demonstrated as a result of the facts found at the eligibility hearing a little bit more than a year ago, or excuse me, a little less than a year ago, that the city -- that the city does satisfy the best interest test even though it's not in a position to raise taxes and doesn't pay taxes.

Now there's another dimension to the best interest test. And it's the comparison to alternatives. And the alternative of course in a Chapter 9 case is dismissal.

And here again one of my themes is going to be we know an awful lot about what a dismissal scenario is going to look like for the city again, based on facts that have already been found, or facts that we can find by looking around us. And we don't need to guess about the future and project about the future, or gaze into crystal balls to the side that dismissal is not a satisfactory alternative.

And again I want to remind the Court that the relevant standard is not whether someone can conjure up -- some creditor can conjure up a particularly rosy scenario for that creditor as to how that creditor might navigate what I will describe as a very disordered orderly process and somehow come out the other end doing better than it would do under the plan

and doing better than everyone else. That's not the test in Chapter 9. The test in Chapter 9 for best interest looks at the creditor body as a whole.

So one of the things that we established earlier, I don't think it's subject to dispute, is that the city can't raise taxes itself. It's at the limits or very very close to the limits of the taxes it is authorized to levy by the State of Michigan.

Only Courts can raise taxes through the application of the Judicature Act and it's only the property tax that can be raised through -- by creditors through exercising that creditor remedy with a Court order.

And if the city again, if we succeed in showing, if we haven't shown -- if we -- as we have shown already, that the city is in a downward spiral now. Dismissal followed by increased taxes will only mean that the downward spiral will continue or get worse.

And if that's the case, again as the cases demonstrate, I don't think we need to -- to develop a forecast or speculate about it. The city is going to be even less able to generate revenue. It's going to -- it's going to lose more residents. It's going to lose more businesses. It may well have more delinquency problems. And that's going to make the entire situation worse, not only for the residents that are still here, it will make the situation worse for creditors as well.

And by the way, this is also a corollary of where the city is today and its needs for a tremendous amount of investment and more money to improve services.

Now the objectors say, one of their important prefatory points is why a dismissal could actually work, is that the recovery plan can still be implemented. That the investments can still occur and that the services can still be improved using exactly the same amount of money as is contemplated under the plan.

And -- and the reality is that that's not realistic at all. So again let's just focus on some things that we know. We know that on dismissal the post-petition loan will default and will become due and payable, payable at -- at using a big chunk of city revenues.

We know that no exit financing will be available. More importantly I think the -- the argument that there will somehow be an orderly process because of the way the Judicature Act works, I think is wrong.

We actually decided that already, or Your Honor actually decided that already when Your Honor found that the out of Court negotiations in this case were impracticable. Why did you find that?

You took a look at the number of creditors, the multiple kinds of creditors, the different kinds of liens, lien substitutes, and priorities asserted by creditors, the

competition of different kinds of state law preferences.

We talked about at the eligibility hearing, and I'm sure no one forgot, that there's a real problem under applicable state law in the apples and oranges issue. For example, just to take one apple and one orange.

You have in the LTGO context the "first budget item" mandate. But you have a constitution that says, fully fund pensions. To -- at least to me those seem a little bit difficult to reconcile. I don't envy the Court that's going to have to figure out which of those two come first. Or for that matter, many many other different kinds of preferences awarded to creditors in isolation by the legislature probably without realizing, certainly without addressing the fact that a different kind of preference, or privilege, or priority was awarded to another creditor at a different time.

There is no ability to organize creditors, or at least a greatly reduced ability to organize creditors outside of a proceeding, or in a dismissal scenario. As -- as was noted extensively at the eligibility hearing, many retiree groups that -- that would -- that looking outside in one might expect were capable of creating some form of organization, disclaimed an ability to do so. And even those that said that they could be representative, they were clear that they had no ability to find the dissenters in any way.

Now when Your Honor decided that pre-petition

negotiations were impracticable, I don't think you decided that the negotiations were impossible, but the situation would nevertheless be adequately controlled by the State Courts. But that's effectively what the objectors are arguing.

In their world everyone will get in line at the courthouse very orderly in single file, obtain their judgment liens, and be content to split pro rata anything that is collected. Well, we know that's not going to happen. We've proved that's not going to happen.

The first several months of this case I think are a good living laboratory where the result that you would get immediately following dismissal. And what am I referring to?

At the beginning of the case, and I've -- and I've had to describe what was happening at the beginning of the case in -- in a number of different places. And I explain it this way. That for several months you -- whenever I spoke to a creditor, that creditor said, Detroit is in a very unfortunate and difficult economic situation, but we should be paid 100 cents and here are all the reasons why we should be paid 100 cents.

And Your Honor saw that play out in the courtroom. In the beginning we dealt with eligibility objections by the retirees asserting that well, Detroit may be in a difficult situation, but the obligations to retirees could not be impaired.

You then saw litigation by the UTGO holders that said

among other things, we have a lien on certain revenues collected by the city and if you don't pay them to us, the city has no right to collect those revenues and would have to just not collect them from taxpayers.

You had the LTGO note holders. We talked about them in the different context of whether the settlement should be approved. But they came to Court and said they had a superior position.

There is no reason why all of that wouldn't happen again. There is every reason to expect that all of that would happen again in the State Courts, but with a very important difference. State Court Judges would not have the supremacy clause and the ordering principles that exist under the United States Bankruptcy Code in Chapter 9 in particular to deal with all of the conflicts and all of the priorities that are being asserted.

Instead you would have State Courts having to -- to give credit to all of the state laws there being no federal law reason not to, and then have to reconcile all of them.

There is no evidence at all, there is no evidence that one could possibly bring to the Court which would negate the conclusion that arises from the -- the beginning of this case, or the pre-filing history, or what happened in this case itself to suggest that constituents that can point to any particular provision that might possibly give them an edge,

will not do so, will sit still and will be content to line up just as the COPS holders would like them to, next to the COPS and not in front or behind.

There is another part that I think is -- is -- is a little hard to understand. There is an assertion that the Judicature Act liens are pari passu. And frankly I think that's right. But that has bled into an additional assertion that because the liens are pari passu, that all the money collected would necessarily be distributed pari passu.

Well, the next point, the very next point I think that the objectors make is, or -- or don't make, is that the objectors are not even prepared to allege that enough will be collected. They don't assert that when these new bills go out with all the different lines, and Your Honor has seen the example of a bill during the LTGO and UTGO hearing where there's a different line for each assessment.

No objector was prepared to say, I think FGIC spends the most time on this, that in fact the bills will be completely paid but there will be more money. That's their assertion.

Well, it turns out that allocation is not a problem if a taxpayer pays the entire bill, or if the taxpayer pays none of the bill. Those are both very easy cases.

But I don't think we'll be dealing with that case. The problem arises when a taxpayer pays part of a bill. And the taxpayer turns out can pay part of a bill, multiple different

ways.

Taxpayers actually can say, I am paying Assessment A, Assessment B, and Assessment D, but not E, and not C, and none of the rest of them. They actually sometimes do it turns out. How is that payment to be applied?

There turns out not to be an answer to that question. It might be coming to a State Court Judge near you if it turns out that we have a dismissal in this case. What if a taxpayer doesn't say but sends a check in an amount that's the same as one of the assessments. Does it get attached to that assessment, or do something different with it? It turns out that issue hasn't been decided either.

And finally, what if a taxpayer just pays a number that's smaller than the total bill that doesn't match up to anything? Is that necessarily pro rata? And it turns out that actually hasn't been litigated either.

So the reality is apart from the issue of creditors asserting different priorities as a result of state law that can't be reconciled as easily because you're not in a Chapter -- Chapter 9 case, you also have the problem of yes, you may have a whole bunch of pari passu liens and assessments that appear on a bill, but unless they're paid in full, there is a raft of allocation issues.

And I think Your Honor saw it actually in the LTGO/UTGO case some indications of that because of course it never got

resolved because the case never got far enough. But I think Your Honor heard that there was a good deal of significant issue concerning how -- how collections had been accounted for and allocated to different assessments with respect to bills that hadn't been completely paid.

And there is going to be, if that case didn't get resolved, a -- a -- a -- one component of that larger dispute was going to be figuring out exactly how much was collected on account of different assessments and circumstances where bills were partially paid. A nightmare I am glad that we avoided here, but would not be avoided in dismissal.

So our conclusion again from facts that we know, from experience here, from things we know about this case and the positions of creditors, not guesses about what they might be, what we saw what they are, whether there is a race to a courthouse or courthouses, or mob scenes at courthouses, there is not going to be a single line where everybody agrees what their rights are and settles for some form of treatment arising out of a pro rata assessment as to which no one expects it will be fully paid and where the allocation scheme where partial payments occur, is not yet clear under the law.

That Your Honor, is a mess. And it is a further demonstration that the -- that a dismissal scenario is not good for creditors generally. I will go further to say I don't think dismissal is good for any creditor. But as I

indicated before, Chapter 9 very clearly states that the test relates to creditors generally.

We will of course have more evidence on dismissal. But again I want to -- want to say that I think that in terms of the record already established in this case, the -- we may well, the city may well have already demonstrated and the facts as they have developed in this case, may already have demonstrated that dismissal is not a satisfactory alternative for this debtor for which out of Court negotiations were impossible or impracticable and as to which judicial machinery that would apply wouldn't help make that more orderly very much.

My last point with respect to this section is to return to the FGIC argument that all this might be okay because by creating liens pursuant to the Judicature Act on -- or not liens, I'm sorry, assessments pursuant to the Judicature Act and raising taxes would create such an uncomfortable situation for the city that it would then change its mind and sell DIA assets if it can to one of their preferred bidders as opposed to pursuant to the grand bargain and the DIA settlement.

And -- and I would submit to the Court that that is a completely inappropriate argument, it is an improper use of the law, and an objective that this Court shouldn't tolerate and would not change the outcome of the best interest test.

There's one more point in the best interest category that

I -- well, two more points. They're -- I think they're relatively small, but I should cover them.

First of all, there is an assertion that COPS, again it's an assertion that's COPS specific and therefore in the city's view not an appropriate consideration for application of the best interest test, but we'll deal with it anyway. The COPS assertion is that the DWSD has an obligation to pay part of the COPS arising from the fact that the DWSD has -- was pre-petition charged by the general fund for a portion of the COPS debt service.

Partly we think this issue should be disregarded completely for the reason that what happened was that the DWSD reimbursed the general fund. The DWSD did not make any payments directly to COPS creditors and it's not clear that the DWSD would be obligated, in fact we don't think it would be obligated to make payments directly to COPS creditors, it's the city that's the obligor on the COPS, not the enterprise fund called the DWSD.

The DWSD's obligation, if it has an obligation at all, is to reimburse payments that the -- reimburse payments that the general fund makes. The -- the payments -- there will be some payments in respect to the COPS, in respect to the B notes. It's conceivable that there's a reimbursement obligation that arises as a result of that.

But there isn't a reimbursement obligation that arises

with respect to -- to amounts that the general fund doesn't pay. And so it's -- it's hard to figure out a basis as to why the -- the DWSD can be charged for a prior allocation in amounts -- in respective amounts paid that will not be paid any more.

That the general fund might be able to charge back amounts it pays does not mean that the source of reimbursement is liable to the city's creditor or that the city's creditor has any interest in that -- in those funds.

Lastly, there is a series of complaints that we'll have to deal with that not enough of a restructuring has been achieved. That the -- that there were ideas within city departments that the emergency manager and his team didn't consult adequately. That although there is a plan to deal with blight, there's no follow on land use planned for blighted land.

That the -- the city did not adequately reform its labor agreements, did not gain adequate ability -- adequate flexibility under work rules, wasted an opportunity to reduce the number of -- of labor groups it negotiates with, bargaining units, or collective bargaining agreements.

And, Your Honor, the -- the evidence of the development of the restructuring plan will demolish these assertions. And even Syncora admits in its papers that there have been changes and there have been improvements. Like everything else the --

the -- the structure of the labor relationships that the city has is not necessarily ideal, but it's not the city's choice.

There are two sides to this equation. And with respect to agreements and work rules the city most certainly had a negotiating position that included additional elements it would have liked to have achieved but was not able to because at the end of the day it wanted to reach compromises, it wanted to reach agreements, and it did so.

The improvements that have been achieved are adequate. It's not only the city and all of the people who worked on the plan that will testify to that, Your Honor's expert witness on feasibility will as well. We don't think we will have any evidentiary difficulty in demonstrating that the plan -- that the -- that the restructuring part of the plan, the rehabilitation part of the plan, was constructed exceptionally carefully and that the results achieved are actually impressive in light of the circumstances faced when the city commenced its Chapter 9 case.

I'm now going to turn to discrimination which of course is -- is -- is a topic that has been stressed quite a bit by the objectors. And the first part of the analysis is to determine whether or not there is any discrimination in the plan that can be fairly described as extreme.

And, Your Honor, it is the city's view that there is not any extreme discrimination in the plan. And I'm going to

spend a little bit of time discussing why.

First of all to begin with, we have to remember that the plan treats the unfunded portion of pension claims. And these are classes 10 -- Class 10 for PFRS or the uniformed -- pension plan for uniformed employees. And Class 11 which is the pension plan for GRS employees.

And so in evaluating what the distribution really is on account of a general unsecured claim, the first step is to determine the allowable amount of pension claims as of the petition date. To calculate the unfunded portion as of the petition date, we need to calculate the amount owed to pensioners on that date and subtract the market value of the assets held by the pension funds to pay those claims.

Not quite a situation where there’s a secured claim and an unsecured claim. There’s just another source in two separate entities that will pay those amounts.

At this point I just want to digress to answer a question you placed to Mr. Howell yesterday about who is liable. The city is -- the city and -- and I -- and I think the representatives of the retiree committee mentioned this. The city granted pension rights, or contracted the pension rights in agreements with employees. They are city obligations.

The two retirement funds are separate legal entities that are basically funding vehicles for the performance of that city promise. It’s in all likelihood that an employee has a

right against the pension fund to the extent that the pension fund doesn't use the pension fund resources to make payments to the individual that were contracted by the city and were supposed to be paid by the pension fund. But the employee nevertheless retains a right to get the city because this -- the employee's contract that has the pension rights in it is a contract with the city. So that's the way that works.

Okay. So the assumption that is in the papers and that Mr. Hackney articulated yesterday during the motions in limine by the objectors, is that the agreement reached that has been put in the plan that included a claim amount which by the way was calculated as of not the petition date, but it was calculated as of June 30th of this year, 2014, is determinative with respect to the allowed amount of the claim on the petition date.

For many reasons that is incorrect. First of all, I think we have to remember that what the disclosure statement does is it's explaining to particular creditors what is happening to their rights against the city.

And so with -- when dealing with bond holders it's actually pretty easy because as we will see in a little bit more detail in a minute, for Bankruptcy Code purposes, their pre-petition claim is measured by their principal amount, all post-petition interest being disregarded as unmatured interest. So it's really easy, that's the number everybody

focuses on.

With respect to pensions, as Your Honor learned when we were trying to figure out how to make disclosure to creditors, the situation is a lot different. A pensioner isn't focused on figuring out what that pensioner's claim is as of the date of the filing of a petition versus the assets that are there. A pension fund creditor wants to know, they got a check that they're currently getting in a certain monthly amount. As a result of the restructuring what is that check going to look like after the restructuring and how is it going to change. And the lion's share of the negotiations and the lion's share of the disclosure targets exactly that.

The other kind of arithmetic or math, arithmetic is probably oversimplifying it, that was done in connection with the disclosure statement, was to look at the one, rate of return for -- that should be expected with respect to pension amounts that's the 6.75, there are complaints about that too, we'll come to it.

But also the stream of payments that were expected to be paid to -- to pensioners both in the pre-petition environment, but again as of June 30th, 2014, and the in post-petition environment, were also discounted back again to June of '14, using the same rate as investment return, the 6.75%.

That clearly reflects a convention that actuaries use and that accountants use to determine whether a pension fund is

more or less in balance or fully funded. Why do they use that convention?

They use that convention because they're assuming, the assumption is that the 6.75% return will be achieved. And mathematically the way to determine if an investment flow generating a 6.75% of return is actually sufficient to pay pension benefits, is to assume that those pension benefits are moving at the same rate. It's just a way to make sure the numbers match up over time, subject to a little bit of flex which isn't important for our purposes.

But let's talk a little bit about the 6.75% rate. The 6.75% rate is a rate that includes an investment assumption. It's about how money is going to grow going forward. It isn't a rate that one would necessarily use if one wanted to answer the question what would be the pension holder's allowable claim as of the date of the petition.

It's an irrelevant question under the agreement that was reached between the retirees and the city concerning the adjustment of their pensions. It becomes a very relevant question when we want to compare the return that is being given to pension holders on account of what their pre-petition claims would be to the return being given to COPS holders on account of their claim.

I'm going to demonstrate this a couple of different ways. First of all, we know that the pensioner -- that -- excuse me,

that the COPS holders believe that the recovery -- the B notes with an interest rate of 5% really shouldn't be valued at par because they think the relevant investment return rate that should be applicable to the B notes is even higher. Okay.

But the -- whatever investment return rate that is put on, or whatever proffered discount rate is put on the B notes, that is not a rate that changes the allowable amount of the -- of the claim that's asserted by the -- by the bond holders. They are completely separate calculations.

And as -- and -- and as I said before in the case of the bond world, the calculation is based upon the principal amount without regard to interest. So the investment return that is going to apply to the distribution on account of the bond claims has nothing to do with valuing or calculating the bond claim as of the date of the petition.

Now, there's another exercise that I thought about which could demonstrate to the Court that using a 6.75% rate for discounting the obligations to the pension holders in an effort to -- to find their pre-petition claim generates a number that is not comparable for purposes of comparing the distributions on bonds.

And what I did, and I think the first slide is the one I'd like everyone to look at, it's exhibit number -- it has an exhibit tag 614. And I am really -- I wear glasses too, I can't stand this chart how small the numbers are. But it's

what it took to get them on one page.

What I did here, and this is just a mathematical exercise but it does have a point. As I said, let's take a look at what would happen if we took all of the cash flows that the COPS are entitled to under their instruments and discounted them back at 6.75.

Again, clearly not the way we're supposed to value the bond the -- the bond claim amount. The bond claim amount is just the principal amount without interest. But if -- but if 6.75% is right for those guys, the retirees, why don't we see what would happen to the COPS if we applied that rule to the COPS.

So I have this chart and a couple of things by way of background. There is -- there is basically three different sets of COPS. The first block at the top not highlighted is the fixed rate COPS. They're not highlighted, not because they're not important it's just because it's a little less complicated to make the calculations. So we know what the principal is, we know what the interest is, and we calculate that every single year for the entire maturity. And then we put the total payments in each year. Kind of like what you would do with retiree benefits. You'd look at what they are in each year going forward for out into the future as long as you would expect to be paying them.

And there are two clumps of variable rate COPS. They're

larger in the aggregate. The first they differ in terms of their libor spread. They're both based upon three month libor.

The first set on the chart is libor plus 30 basis points, or libor plus .3. And the second set on the chart is libor with a spread of .34. So it's a slightly more expensive set. And I just highlighted the ones for 2014 to show that the -- the current interest rate on the COPS is pretty low. Well lower by the way, than the 6.75%.

All of the fixed rate COPS are also lower than 6.75%. You can find the actual interest rates and the proposal for creditors are on Page 118. The -- about 640,000,000 of the COPS are between 4 and 4.95% and around 150,000,000 of the COPS are at -- are at 5.989%, so pretty close to 6.

So because the -- because the COPS are -- the two sets of COPS on the bottom, the two ninety-nine and the -- and the roughly five hundred, are floating rate. We had -- and it's very low now. We had to find a forecast and we picked one from Bloomberg because they had -- there is a forward market for three month libor and we plotted that out all the way across.

I'm not going to ask the -- to change the projection because this is the part we need to see. But it goes -- but there's a projection, a three month libor, all the way through to 2034. That's actually only relevant to go out that far

with respect to the second group. The first group matures in 2029.

And you can see, I found this interesting, that the swap market is telling us that we will get back to something like a normal interest rate environment in 2018 and 2019. This is clearly a projection. There are other ways to do this. They won't vary the analysis very much.

The important point is, is that the -- that at least based upon current expectations, the interest rates never get above about 3 1/2%.

And then if you can move down on the page a little bit, please. You'll note that the original -- the principal balance of the COPS in total is the $1,452,000,000 number that has appeared in many of the presentations.

But if you discount all the cash flows at 6.75%, you get $1,100,000,000 which is not the deviser that we used to calculate the COPS distribution at all. I am not suggesting that this is the way we should determine the amount of the bond claims. We don't have a choice. That's hard coded into the Bankruptcy Code.

But what is not hard coded into the Bankruptcy Code is the method for discounting pension claims. On there the only directive we have is to figure out the amount that they would be, the allowed amount in U.S. dollars as of the petition date.

So we have to decide how to do that in a way that's going to generate comparable numbers. I just realized I forgot something. Your Honor, will likely -- you can't forget that there -- that the COPS holders argue that 6.75% is too low. If it was higher, the one million one -- 1,110,000,000.3 number would be even smaller. So it would create a further discrepancy and methodology concerning discounting to push 6.75% higher. I just want to make that point.

Okay. There are three ways that we submit are a better and more accurate way to look at pension claims in order to determine their allowable amount as of the petition date so that we can figure out as closely as possible on an apples to apples basis what the distribution is on account of pension claims in a way that it can be clearly and accurately compared to COPS claims.

Number one, follow the U.S. Air decision. It's in our papers. Your Honor may be familiar with it. It was written by Judge Mitchell. If I had time, I would read the quote that we included in our papers where Judge Mitchell says, the reason you do not use some form of reasonable investor return rate for purposes of discounting pension claims is not because the PBGC specifies a rule. That was PBGC's argument, which is listen to me.

His reasoning was that has the effect of -- of putting investment risk on to the pensioners. But if there's one

thing that we know about the Detroit pension plans, both PFRS and -- and GRS in their pre-petition incarnation is that the retirees were insulated from and had no investment risk, 100% of the investment risk was on the city.

THE COURT: Would you adjust that microphone so it's pointed right at you?

MR. BENNETT: I'm sorry.

THE COURT: Yes, thank you.

MR. BENNETT: Is that better?

THE COURT: Yes.

MR. BENNETT: Okay. As I said before, we wouldn't borrow here the PBGC rate. And wouldn't argue that we should use the PBGC rate because the PBGC promulgates it. Of course the PBGC rules, regulations, and statute is inapplicable.

But what we do know from Judge Mitchell's opinion and from the way the PBGC describes that it calculates the rates that it uses, is that they have a fairly innovative and interesting and accurate method of canvassing the market. Accurate because it's blind. No one knows who is asking the questions.

And they basically solicit bids from other insurance companies to write annuities and figure out the implicit interest rates that insurance companies are using for issuing annuities and they use that discount rate. So -- so one of the approaches is to follow the U.S. Air case, use its

methodology, borrow some work from the PBGC because they seem to do a good job and have a methodology that other courts have found to be sound, and use its rate.

Now one of the things we have to clearly talk about is the CSC Industries case decided by the 6th Circuit where the CSC Industries case had a Bankruptcy Court that used the -- the investment return type rate, or the investment return loaded rate like the 6.75 instead of the PBGC rate and the CSC Court said they weren't going to upset that.

And I think the important thing about the CSC, the 6th Circuit decision in CSC is it's not trying to decide which is right, it just said the Bankruptcy Court was free to decide under the circumstances of that case that the reasonable investor rate was the right rate to use.

By the way the CSC Industries Court found that because they were concerned about doing an apples to apples comparison within a class and that Court thought that for purposes that aren't completely clear from the 6th Circuit opinion, that the -- that the equivalent of the 6.75%, it was like 10, it was higher, was the -- was the best way to achieve the distributional equity within the class that the Court was dealing with. That that was a closer discount rate.

The exercise that I had on Chart 1 shows that 6.75 isn't actually a good rate to create a comparable analysis with respect to the COPS claims, you need a lower rate.

So in any event one alternative is to see -- is the -- is to use the PBGC rate and I'd like to put Chart number 2 up. No, that's not the one. Number 616. That one is for later.

Okay. This is the effect of using the PBGC discount rates on the PFRS and GRS anticipated claim numbers. The recovery for purposes of this exercise as you can see, and we'll get this argument about what counts in the recovery and what doesn't.

For purposes of preparing this chart we have done it the city's way. This chart can be prepared any other way, but for purposes of just getting into the ballpark what you will see is the recovery percentages if things are calculated in accordance with the PBGC rates. For PFRS it's around 8.6%, for GRS it's around 21%, 20.7%.

The last comment I'm going to make with respect to the use of the -- the CSC reasonable investor rate is that history has not been kind to the Courts that have used those rates. And we show in our papers that -- that there are lots of very high rates that came out of these reasonable expectation calculations, or these investor expectation calculations that were never realized.

And I would submit that it's another suggestion that it's hazardous to be discounting fully enforceable obligations to retirees under applicable non-bankruptcy law with a rate that includes investor expectations which by the way it looks like

historically have turned out to be too high. That's not fair to retirees.

Okay. This isn't the only approach. There's another approach. And the retirees actually believe that the second one is -- is -- is more appropriate and that's to use a risk free discount rate.

This turns out to generate very close results to the PBGC type approach. It's the same effective approach. It uses a different interest rate. You would expect the risk free rates to be slightly lower because the annuity pricing survey that the PBGC does is a survey done of profit making companies.

So if we can now see the next chart, it's Exhibit 617. Oh, the risk free rates also -- the risk free rates also the -- the -- they don't -- they don't have a step in them that the PBGC does. So I guess they're -- they're a little bit lower on the front end and a little bit higher on the back end is what happens.

Here you see you wind up with essentially the same numbers. Recovery percentage of about 9.3% for PFRS, recovery percentage of about 22 for GRS.

And then there's a third alternative which actually has the charm it turns out of tracking the methodology prescribed in the Bankruptcy Court for dealing with bonds most closely of all.

THE COURT: Can I interrupt you with a question?

MR. BENNETT: Sure.

THE COURT: On -- on both 616 and 617 you have your recovery amounts there on the second line.

MR. BENNETT: Uh-huh.

THE COURT: Three sixty-one nine and seven seventy-three eight. You see those, right?

MR. BENNETT: Yes.

THE COURT: Where do those numbers come from? What are those numbers?

MR. BENNETT: This is the -- okay. The -- in three sixty-one nine on the left, it's the only thing that is included is the city general fund contribution to the -- to the PFRS which kicks in beginning in year ten.

What is excluded is right below that. We've included all the data you would need to do it differently if you chose to. The state -- the state contribution headed the PFRS is the 92.9. The DAA is -- is 19.2, that's its fraction of the 100. And the foundation is 134.3.

With respect to GRS, the seven seventy-three is a list of a whole bunch of different things that are going in at the -- going into that including the DWSD contribution that we're going to talk about. The UTGO, the library reimbursement and all those things together, the 403 and those three numbers add up to the 773.8.

THE COURT: Okay. So the city general fund recovery

element, three sixty-one nine and four oh three five is provided when?

MR. BENNETT: That -- they -- they come in beginning in -- beginning in year ten after the first nine years.

And as Your Honor may remember, the agreement is, is that the funds are funded to -- out of other sources to a certain point and then beginning in year ten, the -- the city picks up the difference.

THE COURT: And so this -- this chart doesn't discount that for present value?

MR. BENNETT: It does discount that to present value using the 6.75%.

THE COURT: Yes, okay.

MR. BENNETT: The relevant -- the -- the -- the investment return -- on the investment return side is included. That's why the (Inaudible) comes out at three twenty-eight, not four twenty-eight for those reasons.

Okay. The -- the last approach that I want to talk about is in many ways becoming my favorite. And -- and this is -- as you remember the approach that applies in the case of a bond is you ignore interest, you take principal, you don't discount principal.

Well, it turns out that the Detroit pension funds are actually not structured too dissimilarly than that. In the colloquial language of this case we refer to the COLAs with

respect to the two pension funds. COLA of course is cost of living adjustment.

But what we don't often explain but it's true, is that in the case of the two Detroit pension plans, the COLA is not an adjustment based upon actual changes in the price level. It is a stipulated contractual rated increase that is applied every single year.

So it's kind of like an interest rate. It's actually extremely analogous to an interest rate. So it occurred to me why don't we apply the same rule. Strip out all the interest, all the COLAs from the pension -- from the pension plans and just look at the payments to employees as principal amount. And don't discount them.

THE COURT: Okay. But before we cause widespread panic here, you're not talking about eliminating those COLAs in your plan.

MR. BENNETT: No. This is -- this is just a mathematical calculation. The -- the -- the -- just to be clear, the part of the -- the place we are on the map is we're trying to figure out what is the best way to calculate the theoretical, all this is theoretical. We -- a deal has been cut with all the retirees.

We are calculating the theoretical allowable amount of the pension claim as of the petition date, calculated in the way that is consistent as possible with the statutory mandate

as to how to calculate bond claims as of a petition date where we have no specific statutory mandate for how to calculate the pension claims. That's up to Judges.

So what we did is we stripped out the COLA for purposes of the calculation, not -- we did not say we're terminating the COLA. We -- we stipped it out of both PFRS and GRS and then calculated the numbers again. And that's chart number 4 -- or excuse me, number 5 -- no, 4, I'm sorry. Four, Chart 4 we're up to. And that's this one.

THE COURT: 618.

MR. BENNETT: Exhibit 618. And again same convention with respect to what's included in the distribution or not included in the distribution. We're going to get there, I'll cover that issue.

But if you do the numbers the city's way we now have distribution amounts of 7% with respect to PFRS and 15.1% with respect to GRS.

I think these speak for themselves. These are not -- these are -- there is -- whichever method that you choose to more closely and more accurately figure out what pension claims would be, what the unsecured amount of pension claims would be at the petition date, you wind up with numbers that don't discriminate or discriminate extremely slightly.

Before I move on to the issue of what assets count and what assets don't count in the calculation, there's one more

issue we have to deal with and that's the issue of vested and non-vested benefits. And I'm afraid here there's been a lot of confusion about what vesting means.

We use accrued benefits. And we admit that accrued benefits is the right measure. We are accused of conceding that the right amount is accrued invested benefits. We have never said that.

Vested benefits are of course lower than accrued benefits. But what does vested benefit mean? The vested benefit is the benefit that's protected if the employee leaves. If the employer breaches and, for example, to figure out where it would show up in the cases, where -- where there is an inappropriate termination of an employee by an employer, the damage claim isn't the vested benefit, the damage claim is the accrued benefit with by the way all of the seniority improvements and enhances that the employee would have achieved had he was not been fired.

When the debtor is in bankruptcy and is not performing its obligations that is much more analogous to the circumstance where the employer is the breaching party, not where the employee is leaving. So from our perspective, the proper measure of damages is based upon accrued benefits, not vested benefits. All of these numbers have been accrued benefits.

I won't spend the time here. If this is still a dispute

at closing, I will bring the cases and there are many that describe the remedy against an employer where it’s an employer breach and where the demonstration is that it’s not the vested amount, but it is the accrued amount in the Court’s view that -- that would be payable and is therefore the appropriate measure of the claim.

Okay. In terms of assets that should be included and not included -- not included. Number one, there was a assertion that we were excluding UTGO settlement proceeds in the calculations. As you’ve seen here, we’ve actually included them.

I’m not sure they should be. By the way there’s argument they shouldn’t. The -- the part of the UTGO settlement proceeds that’s -- that is -- that -- that is being made available under the plan for hardship cases in the pension universe isn’t actually being distributed evenly. It’s frankly a appropriate policy response by a city to alleviate distressed condition of a certain, you know, segment of its population.

I would argue that’s just a legitimate and reasonable use of property. But it’s not a big number. We included it so we wouldn’t have a fight over that.

The next assertion is that at the petition date when calculating the claim we shouldn’t simply subtract the market value of the assets against the claim however it’s calculated,

we should make some adjustment for the expected return on assets.

This is of course silly when you have a stock or a bond and it’s got a price in the market today. That price reflects the expected future return on that asset. It would be quite absurd to say oh, let’s go look in the paper, here’s the price of GM stock today and then say oh, I think that’s going to have a higher rate of return so I’m going to put it in at a higher value.

That -- that is exactly the kind of accounting that we’re in the business I think of discouraging as opposed to encouraging. The only defensible measure of the amount of value that is available for pensioners that does reduce the amount of their unsecured claim is the amount of the market value of the assets.

Cash at face amount, bonds at trading prices, stocks at trading prices, and more exotic assets that are difficult to value at fair market value. That’s the way to do it.

By the way that is the way we determined allowed secured claims as well. And for purposes of distribution, you have to up take that number to the confirmation date of course because the collateral increased in value and if the pension fund increased in value, we’ve got to capture that too.

Then we are told that because in calculating the value of the contributions from the state and the DIA and the

foundations, that the discount rate shouldn't be 6.75% because those contributions are more certain. But frankly that's not the reason why they're discounted at 6.75%. They're discounted at 6.75% because it's an opportunity by people who have made those commitments to get an early payment discount at 6.75%.

So it would be wrong to -- to kind of adopt a -- a lower discount rate when the person -- the payor can capture a 6.75% discount rate.

And lastly, before I get to the ones where there's the huge controversy. There is the DWSD recovery which is -- which is a certain qualifying transactions generating very specific kind of proceeds trigger an additional distribution to pension claim holders, but that could very easily be zero. And for right now we've included it as zero. And of course if you read the papers that were filed by the counties, their view is it will forever be zero.

Okay. Then there are several categories of payments that are -- that are, you know, kind of -- have attracted a lot of attention.

The first is ASF recoupment. And here I think there's a lot of confusion about what's going on in the ASF -- ASF recoupment. Our view of ASF recoupment is that it isn't actually a part of a return on the city side at all.

The ASF recoupment is basically recovering money that had

been either lost or converted at some point in time like collateral that had been lost or converted and then the collateral was coming back. So to the extent that the opposition says, you shouldn't include the ASF claim in your calculations of the amount owed, the answer is, to the extent that the -- the ASF -- the ASF claim should not be included except to the extent that there's any claim left over against the pension funds and I think there isn't, but by the same token the ASF value recovered should not be considered part of the distribution, it is considered an offset to the amount of the unsecured claim because basically collateral or value that should have been available has been recaptured.

Now why is that significant? The opponents use the -- you know, the big 50%, 60% numbers that are in the disclosure statement. Those numbers do include the ASF recoupment as a part of the distribution because from the paycheck perspective of a -- of an employee, the ASF numbers are coming out of the ASF type program and going into the pension program.

But for purposes of determining whether there's been unfair discrimination, the -- the "recovery of collateral" is what I'm going to call it, is not part of the equation, it's just not part of the unsecured claim at all.

So to the extent that they're saying the ASF claim doesn't belong in the numbers, it doesn't. But the ASF property doesn't belong in the numbers either. That's point

one.

Point two, exclusion of grand bargain payments. Two categories. The -- the amount that came by reason of the DIA transaction and the amount that -- that came from the government or will come from the government as a result -- the state government as a result of the state settlement.

The most important case in this area is Bryson Properties. That's a District Court case from the Middle District of North Carolina. I cite to it and say it's important because of the quality of its reasoning.

And the situation there was that there were differences in -- in payments between two classes. It turned out that one class had a guarantee from the -- the guarantee or liability of the general partner. I'm actually not remembering which right now.

But it had a claim against someone other than the debtor and the different class didn't have that right. And the assertion using essentially the same words that have been used by the objectors, there was a provision in the plan for satisfaction of the guaranteed or general partner liability claims at a higher rate funded by the general partners.

And the objectors said, wait a second. That's unfair discrimination. Both those payments are coming under the plan.

And the Bryson Properties Court disposes of that

contention with I think perfect language. I quote, “the third plan ...” -- they were better than us, they got it done in three. We’re on number six. “The third plan does therefore make some distinction in its treatment of the unsecured creditors. But the plan is not the source of Travelers’, who is the complaining creditor, disadvantage. The distinction made by the third plan is simply not one prohibited by the Code”.

So what’s the test? The test is why was there a difference. And if there was a reason for -- for a difference that was just inherent in the claim of the creditor or something else, then it’s something that it’s excluded.

So we have two different kinds of payments coming out of the grand bargain. I think the state payments are the easiest. They are exactly comparable to what was going on in Bryson Properties.

The retiree committee vociferously has asserted that one of the benefits going to retirees from the constitution and the state’s subsequent authorization of a Chapter 9 proceeding, is that the retirees have been damaged and that the state is responsible for the difference.

The state has never admitted that. The state in fact has -- has -- has in all instances denied it and pointed out reasons for the -- the basis of their position. But they see the virtue of a settlement of the claims against them as well.

And they are making available money that is certainly being distributed pursuant to the plan but is nevertheless not the source of the COPS disadvantage. The COPS disadvantage is they don't have a claim against the state. In the circumstances we think that none of the state contribution counts.

We also think that the DIA and the foundation's contribution shouldn't count either. And here is still another ripple of the very first topic of discussion that we had yesterday which is do the COPS have any claims whatsoever in respect of assets of the city.

I'm not going to repeat the argument here. The basic elements are take a look at applicable non-bankruptcy law, can't find it there, take a look at Chapter 9, no change. In fact Chapter 9 doesn't enhance unsecured creditor remedies in any respect, it cuts back on them.

There is no basis under applicable law to assert -- for the COPS to assert or for anyone who is a normal unsecured creditor to assert they have a right to any of this value. It's another disadvantage that is not in the plan, it has another source.

The retirees by the way, and we'll get to this in another prong of the discrimination test, may be different. Because the retirees once again have a constitutional provision outside of bankruptcy and I'm not referring to the non-

impairment position. I'm referring to the full funding position.

So we think that the way we treated the different contributions on the chart is accurate and that the two just described don't count as part of a distribution by the debtor that is tested in the unfair discrimination universe.

Now we come to the point -- well, there is some discrimination and if the numbers are used a little bit differently than we do, or adjusted one way or another for one thing, there might be a little bit more or a little bit less. Is that justification -- is that discrimination justified? And the answer is yes.

We assert several reasons for that justification and in no particular order. The first is the basic what Your Honor talked about business justification, business reasons. Whether that's the right term or not, I'm going to use that term. It is the term that the cases use.

And as I think we all know more than anything the city is in a service business. It needs a motivated and stable work force and it is the city's assertion and the city's witnesses will testify that actives are motivated, probably what's happening to their own pensions and a lot of actives have pensions, but they look to their left and look to their right and -- and -- and think about what their employer will do in the future by reason of how their employer treats others.

So in our view to an active, the treatment of a retired person matters. Maybe not as much as it matters what's happening to the active himself, but it's part of this equation.

The Aztec case itself, Aztec of course is being appealed to because it has one of the statements of the way in which the issues of discrimination might be managed by a Court. It's discussing the Chapter 13 provision which is worded the same way.

It sets out a -- guidelines and analysis that should be useful for 1129(b)(1) purposes. That's the -- that's where the unfair discrimination provision is. And it's -- and one of them is, for example, does the proposed discrimination protect a relationship with specific creditors that the debtor needs to reorganize successfully.

And Aztec collects about ten cases that support that proposition. One of them that seemed interesting is In Re: Hill which talks about making higher payments to health care workers so that they'll continue to provide treatment.

And then another one that I thought was -- was interesting, was In Re: Perskin which was preferred treatment of credit card bills for traveling salesmen. There is eight or so more, but those were a couple that I thought were particularly interesting.

Now Aztec rejected the plan there because the Court

didn’t find the exsitence of a relationship that needed to be protected. The beneficiary of the discrimination was one of the principals. But that certainly isn’t what’s going on here.

And by the way, the -- the Chateauguay case and there are of course many Chateaugay cases, but the one I’m referring to is 89 F 2d 942. There the -- and it’s not really a discrimination case because -- because a -- one claim was given priority and made a post-petition administrative expense and another claim wasn’t.

So -- so in a technical level it isn’t exactly in the same place as we are but its reasoning is very interesting. And there you had insurance companies that were on the hook for certain health claims of employees because they had posted bonds in certain states. And you had employees in other states that weren’t the beneficiaries of bonds.

The debtor elevated and made post-petition claims, the claims of employees that weren’t the beneficiaries of bonds. They did not elevate the reimbursement claims of the insurance companies who had paid claims of employees in states where there were bonds.

And the insurance company said, that’s not fair. Discrepancy, 100% payment for the employees whose claims were elevated to administrative status, 37 to 44% for the insurance companies that had reimbursement claims for having paid

exactly the same thing.

Answer, you can't run a business without employees. discrimination was upheld. Again, not really discrimination, but the one getting priority and the other not getting priority essentially the same concept.

The expert report that was -- was filed by the -- Murphy's expert report. I don't remember whether Syncora or FGIC. If I read it correctly, and we're certainly going to hear from him here, he doesn't because he can't argue from the proposition that employees look to their left and look to their right and figure out what their employees are doing for others.

He's got a long sentence where at the end of the day he seems to concede that that might actually happen. I think common sense says that it does. If -- if -- if a partner, quite likely at Jones, Day is treated badly, I'll notice and do something about it. That's natural.

But then interestingly Mr. Murphy goes on and spends a longer part of his report saying the real problem is that by giving improved pension treatment is an inefficient way of achieving the objective of keeping your employees happy. I don't know whether that's true or not true. I just don't find that qualification in Aztec, or in LTV, or in cases like them.

Where that not only do you have to have a business purpose for -- to justify discrimination, but you need a

business purpose and -- that is efficiently expressed by discrimination, or efficiently implemented by discrimination. That just doesn't seem to be in the law.

And so I find a lot of the evidence that the -- that the opponents are going to appeal to as a basis for negating the idea that there's reasonable business justification is just not evidence that's relevant under the cases. That's not the only reason for the distinction.

There's also a settlement with retirees as Your Honor knows. Now the first attack on this theory or basis for discrimination, is Syncora's assertion that the pensioners really didn't give up anything.

As a factual matter, the cost of living adjustments which we've just learned aren't actually cost of living adjustments at all, they're stipulated, you know, rates of return. If my memory serves me correctly, and I wasn't able to verify this figure, but I think it's right. Between 14 and 16% of the -- of the calculation of total benefits is actually attributable to those interest factors or COLA. So it's not rounding error.

And I think from the perspective of most employees 100 cents on the dollar or 95.5 cents on the dollar are not the same. In fact the Syncora assertions seem like statements that one can only make when discussing someone else's compensation.

I think the retirees will have more to say about the consequences of their settlement on some of the people they represent.

But in any event, one of the important points made by the cases whether it's the Markell test or the Aztec test or -- or even if there are lots of cases of course that don't endorse a test and just talk about these factors.

Is that whether the COPS claims and the pension claims are necessarily "enforceable" in the same manner outside of Chapter 9. And the answer is, outside of Chapter 9, the pensions and the COPS are not necessarily enforceable in the same manner.

Again to repeat something I've said before, there is the diminished and impaired part which we assert, the city asserts and Your Honor found but the 6th Circuit or the Supreme Court hasn't had a crack at this yet, that the impairment provision of the pensioner's clause is exactly the same as the impairment provision under the contracts clause.

But there is that other part of the pensioner's protection under the Michigan contribution -- constitution relating to contributions and funding which wasn't implicated in eligibility, but may well be worthy of thinking about in this context.

There are no cases that explain to us, and I guess this is a point that's also relevant to best interest. There are

no cases that explain to us how a collision between kind of all the other different preference provisions and the -- and the full funding part of the constitution would be resolved outside of Chapter 9.

But it's not irrational to conclude that some kind of priority or some kind disparate treatment would result versus COPS claims in a variety of circumstances. And again the argument by the objectors are since the same remedies are available to retirees and Syncora well, yes, one of the remedies is the Judicature Act but there may be a constitutional remedy.

We already discussed the fact that exactly whether outside of bankruptcy in a non-Chapter 9 scenario if there are preferences, priorities, or other kinds of state differences, a Court's going to have to figure out what they mean and it's more likely than not they're going to mean something.

But more importantly than both of those is the ability of the city to impair pension claims to begin with. Your Honor has most certainly ruled, we agree, I agree with Your Honor's decision that there is no more protection in the pension's clause than contracts have in the contracts clause. It sounds like that Mr. Hackney, Mr. Kieselstein, and Mr. Perez agree.

The only problem is none of us have made it to the 6th Circuit or the Supreme Court. And we don't have the last word on this question.

And if there isn't a settlement with the pensioner's as we know, the 6th Circuit is going to check in on that issue and there is most assuredly some risk that the 6th Circuit Judges will not see it the same way as we do and that would create enormous problems for the city's restructuring.

For this reason there was a settlement. And the settlement has some bearing on whether the discrimination that resulted is rational.

Lastly, in the issue of reasons for distinctions or expectations. It is asserted by Syncora that we ought to be looking at the -- at the sophisticated pension funds as the people ultimately protecting pensioners, not pensioners themselves.

But even Syncora admits that the pensioners vote for the boards and ultimately it's the pensioners who are responsible for how the funds are managed and -- and I guess ultimately how the funds deal with the city. I think it is clear that the pensioners are not nearly as sophisticated as Syncora holds itself out to be.

Imagine the advertisement, Syncora: as sophisticated as an average Detroit pensioner. I don't think that's how they would be selling themselves. Syncora and FGIC on the other hand hold themselves out as among the most sophisticated entities to evaluate municipal debt.

And by the way they don't even lend money. They don't

provide services that actually, you know, are delivered to residents. They evaluate credits and based upon their ability to evaluate credits they sell insurance. The only thing they sell is sophistication and they charge a lot for it.

Whether they accurately understood Detroit's situation when they insured the COPS, it wasn't that long ago by the way, isn't fully known. But it's much more reasonable to expect that they should have understood it better than Detroit's pensioners.

We cite cases in our papers for the -- for the opposition that differences in expectations, reasonable differences in expectations can affect the discrimination calculation. There is a couple of other standards that are applicable in the discrimination context. They shouldn't delay us for very long.

One is was the distinction necessary to achieve confirmation. We submit that it is. That the -- that the deal with pensioners made possible the affirmative votes in support for the plan for two of the largest creditors. It facilitates an early exit of -- from the -- from the proceeding which is of course definitely in the interest of the city.

It likely facilitated the ability to get a deal done at OPEB at the extreme levels. That that had to be done. And most importantly we have put behind us forever the litigation

over the -- over eligibility which as I mentioned could easily have come back.

The next issue is whether or not the distribution to the COPS is meaningful. I don't know what to say other than $140,000,000 in B notes is a meaningful amount of money. It may be smaller than the COPS holders want. It's the same distribution that was approved by OPEBs and that was in respect of claims for medical benefits. That the recovery is small or smaller than the COPS holders would like does not mean it isn't meaningful.

And finally the -- the discrimination that as we've seen is quite modest, was proposed in good faith. We all know it was not -- it has not been finally determined that the pension claims can be impaired in a bankruptcy case. There is enormous efforts to avoid finding out the answer to that question at the 6th Circuit by all sides.

The -- there are -- there are potentially assertions that -- that if the -- if the retirees are successful in convincing the Court that the protection under the pensioner's clause is greater than the protection under the contracts clause. That they are not pari passu with general unsecured claims. That there is some different status that they have.

COPS claims though are at best general unsecured claims. They may not even be that. And in light of those differences of the asserted position making the deals that were made was

definitely in good faith.

The assertion is also made that there is discrimination versus the LTGO claims. I'm not going to add anything to what I said about the reasonableness of that settlement yesterday. I think that covers the basis for discrimination with the LTGO claims which in terms of amount was, you know, roughly, you know, the 10% recovery for the COPS versus roughly 30%.

As Your Honor may remember, among the claims that the LTGOs made was a secure status claim, a lien substitute type claim, a first budget item type claim. Your Honor witnessed that litigation and most of the positions that would be asserted by the parties in the context of a motion to dismiss. And I don't -- I think that's ample basis for the distinction is that settlement.

I'm not going to go into the separate application of the Markell test. I think I've been tracking the consensus of the cases and the summary of the cases that's in the Aztec case. I will say that the Markell test is triggered by the existence of two classes with the same priority.

And I said from the outset that that is one of the issues that is settled as a result of this discrimination. And we don't start with the proposition that the -- that the pension classes and the COPS classes are necessarily the same in all respects particularly outside of applicable bankruptcy law. That's one of the issues that was settled.

But I will also point out that the rebuttal factors in Markell also include a reference to the outside of bankruptcy treatment because one of the potential rebuttal factors is that outside of bankruptcy the dissenting class would receive similarly less than the class of the “same priority”. Remember that’s a little bit up in the air. That is being favored under the plan of adjustment.

Again I don’t think that -- that the COPS can show that outside of bankruptcy. We can show that outside of bankruptcy that the pensioners would do better. I don’t think the COPS can show that they would not.

I’m running a little over estimate. I’ll skip some things. Let me talk about plan proposed in good faith.

In a lot of ways based upon our -- our arguments about the reasonableness of settlements, satisfaction of the best interest test, the fact that the plan’s discrimination is not unfair. All of which is to a degree influenced by the rights that unsecured creditors start out with in -- in a Michigan -- in a case of a Michigan municipality.

There isn’t much left to talk about in terms of good faith. The city did what it was supposed to do. It proposed reasonable settlements, they’ll have to be approved. It proposed a plan that meets the best interest test.

It didn’t propose unfair discrimination. That is the most important indication of good faith. The city did all of

this with the proper purpose of restructuring its financial affairs and emerging from bankruptcy as a viable city.

What Your Honor recognized in the motion to strike -- your opinion on the motion to strike the Syncora pleading, was that whether the plan was proposed in good faith is not dependent upon what mediators said or did. It is not also dependent upon what steps everybody made between the filing of the petition date to reach the agreements that were reached.

What is required is that the city in making the proposal, complied with the applicable requirements of the Code, proposed a plan that is overall fair and we've done that. And that was most of the point of the -- of all of the discussion that we've had to this point.

I'm not going to spend any time dealing with the assertions that the requirement to file a plan in good faith includes a kind of parody objective with making sufficient investment and expenditures for the city to survive and the parody objective being pay creditors as much as you possibly can. It's first things first.

If the city doesn't reverse its -- its current condition that is declining it's not going to be in a position to make any recoveries for anyone. First things first, is resolving the city's current condition.

All of the money that's needed to do that has to come first. And as I indicated at the very beginning when I

started, while we think that the monies that have been allocated for investment and expenditures towards services are adequate, we are absolutely aware that there are no shortage of other candidates for necessary expenditures that could well have been included to make it even better.

So if anything the amounts are kind of on the lower end of reasonable as opposed to the higher end of reasonable. And we couldn’t do any better for the creditors. The numbers show that, the testimony of the -- of the Court’s witness shows that.

Okay. Finally, a few words on feasibility. Feasibility of course is an intensely and unavoidably factual determination. There is not much law that is going to frame that discussion other than the standard which is that -- that the -- there has to be pursuant to the plan a more likely than not result that the city recovers and is able to meet all of its payment obligations and more importantly, provide adequate services to its residents.

By the way, I think the last part has got to be obvious from the very beginning because as I’ve asserted earlier, the city is in a competitive condition as Mayor Duggan has said and I’m sure he’ll say here for the recovery to complete, the population has to start increasing. Can’t be decreasing any more.

And to get into a condition where that very important

result can be achieved, services have to be better. The investments have to be made.

Points that our witnesses will make. Number one, the projections are sound. Yes, they were prepared by a team. Can I have the last slide, please, number five.

This was too big a job for one person. And the job had to be split up among many different people having different disciplines and also there's a little bit about how much time in the day.

THE COURT: For the record 615 is on the screen.

MR. BENNETT: And what 615 shows is, where the inputs came from. That it came from lots of different people and kind of generally what different kinds of -- of work was done in -- by each individual and more correctly, individual and people that were working for them.

The names on the charts are the witnesses that are going to cover the different areas. But the -- but this -- and I would hope that the Court would use this as a useful guide as to how the pieces will fit together.

It was -- the testimony will show, it was an enormous job. I don't think that it will surprise anyone. The different work flows were integrated and coordinated and people talked to each other and they tried to do things as consistently as possible in order to work toward one result that everybody knew that we were pointing to which was

initially ten year projections and then the additional 30 year extension.

You will hear testimony about how the work was split up. That the entire process was well planned. That the integration into plan projections was performed correctly.

There's of course a reality that notwithstanding everything that people have done up until this point, not all of the work that needs to be done to repair the city is completed. And the work going forward needs to be done well, it needs to be done within certain basic financial parameters set out in the plan, but there's also the reality that in the future things will happen that we haven't planned for. Unexpected things will almost certainly happen.

And other people, not the emergency manager, and not necessarily the team that put all this together, is going to have to adjust to the future over time. We expect those adjustments. We expect those changes. They are impossible to predict and nail down.

But by the way that is true of almost every Chapter 11 plan of reorganization which is not accompanied by 40 year projections but is usually accompanied by three to five year projections. And even within that time frame there's a recognition that it isn't going to happen that way, that this is just the best guess as to how it's going to happen.

It is therefore important to remember throughout hearing

the testimony that the focus is whether it's more likely than not, whether there is a reasonable -- more than a reasonable, but a probable chance that everything that's been put in place under the plan will in fact achieve its intended result.

We will show this through -- through many witnesses and they're going to tell you that and more. They're going to tell you that yes, we believe that it's probable and more likely than not, but they're also going to say, we think this is the city's last best chance and that it's going to work.

We will cover this in several different ways. We obviously have to have testimony as to the projections, that the projections are reasonable and why. That they're based on reasonable assumptions. The calculations were performed correctly.

The persons that are responsible for making sure that the plan works going forward, are going to talk about the fact that they've reviewed the plan and are committed to it. That they understand what it provides for. What has to be done by the Mayor's office and the city council going forward.

To be sure as has been pointed out by objectors, many will say that there are adjustments that should be made in some parts and that they wish some things had come out a little differently. As I've said before, there is sufficient flexibility built into the plan so that people charged with implementing it based on circumstances they see can make

appropriate reductions and it -- adjustments and it should still work. That's the way it's been designed.

There will be testimony that there is room for that. There is testimony that everybody understands that there is a blueprint. There are some lines that are hard and can't be erased. There are some lines that are in pencil and can move a little bit. But the overall plan has to be adhered to. Again, feasibility the test is whether it's more likely or not that the plan will be successful.

I think I'm going to leave feasibility with that. I'm sure that I'll have more to say about it at the closing. For now I want to say, the evidence will show that all the city's known financial problems are addressed and resolved in the plan.

That the evidence will show that the resources available to the city to provide services and to make investments for the benefit of its residents is adequate. The evidence will show that Detroit has a better future after Chapter 9. And history will show that Governor Snyder was right when he said that when this case was commenced, the Chapter 9 case will not be viewed as the lowest point in the city's history, but at the beginning of its recovery.

For these reasons and others in our papers, the facts will show that Detroit has earned this Court's help in escaping from its current distressed state through

confirmation of the sixth amended plan of adjustment.

And I said before, as we will show, the plan will succeed. Do you have any questions? I'd be happy to answer them.

THE COURT: No. Thank you. One moment, please. All right. Let's take our morning recess now and reconvene at 10:20, please.

THE CLERK: All rise. Court is in recess.

(Court in Recess at 10:06 a.m.; Resume at 10:20 a.m.)

THE CLERK: All rise. Court is in session. You may be seated.

MR. O'REILLY: Good morning, Your Honor. Arthur O'Reilly for the DIA Corp.

I'm here to talk about of course the DIA settlement. And I want to do something a little bit different I think. And we spent a lot of time talking about numbers and standards and I want to switch gears just a little bit.

Josephine Ford was a very famous and very much beloved benefactor of the museum. She had a painting, quite an amazing painting by Vincent Van Gogh called Portrait of a Postman Roulin.

On April 2nd, 1992, she gave her interest in that painting to the DIA Corp. And she did it because her mother had wanted it to be part of the DIA and at the museum for all to see.

And she also did it because she wanted it to serve almost as a

lead gift, something to inspire additional giving so that our museum would be here for our children and our children's children.

Edward Rothman owned several paintings and sculptures including works by Degas, and Monet, and Pissarro, and Boudin. He also had daughters.

Rather than give them to his daughters however, he made a bequest and he made the bequest to the DIA Corp. And he did that so that those works would become part of the permanent collection of the museum.

Robert Hudson Tannahill, he was one of the -- the lions in terms of the support that he's given to the museum over the years. He spent his life collecting works, including works by Van Gogh, and Picasso, and Monet, MO Digliani, and Seurat, and Cezanne.

In his Will he gave a bequest in which he gave it all to the DIA Corp. for the benefit of the museum. One of the works that he gave was The Diggers.

Edsel Ford another great supporter of the museum. He was also an arts commissioner at one point in time.

THE COURT: I want to interrupt you.

MR. O'REILLY: Yes.

THE COURT: With this question. This is important history and I don't mean to discourage you from telling me about it in your opening statement, but I want to be sure that

this is based on evidence that will be admitted here in the trial.

MR. O'REILLY: It is, Your Honor.

THE COURT: Okay.

MR. O'REILLY: It's based upon documents that have been admitted and I don't believe that there's been an objection.

THE COURT: Okay. Then you may proceed.

MR. O'REILLY: Lizzie Merrill Palmer. I don't know a lot about Lizzie Merrill Palmer, but her documents are that he gave -- she gave an endowment. And the endowment was for $10,000 for the purchase of paintings by American artists. That fund still exists today. A hundred years later it is being used to purchase paintings.

Now the Court saw several of these objects when it did its bus tour. And when Your Honor reviews that video once again you might recall some of them. The Diggers is on the right there. The Postman is of course at the bottom. And on the left, upper left of course is the Detroit industry murals that Edsel Ford had to help fund and Diego Rivera actually painted at the museum.

You also might recall when you did your walk through the museum you saw cards next to the various paintings and objects. Those cards include credit lines. And if you looked at those, and I don't know if you did, Your Honor, but they --

they tell you how the work got into the collection.

And you'll have noticed that many of them were actually donated in some fashion to the museum. In fact of the 60,000 approximate works in the collection, about 57,000 of them were either donated or acquired with donated funds. And each of them have sort of a similar story about how they got into the collection.

When you watch that video again at the end of the proofs, you might recall you walked in the back of the museum. Your bus pulled up to the back. You walked into a little atrium and on your right was a restaurant or a cafeteria.

And on your left, and I don't know if you looked to your left, but there was a donor board. And that donor board was a gold board covered with lots of names. And it was done to recognize all the gifts including monetary gifts by individuals, and foundations, and corporations, and the city itself in fact was listed there. And that's the donor board that's in that court -- that atrium that you walked into.

You'll also recall seeing volunteers throughout the museum giving of their time. And you saw of course people in the galleries enjoying the museum.

So why did I start with these images and these stories? Because this part of the case, this part of the DIA settlement is about two things. It's about respecting charitable donations, and it's also about respecting the people's right

to art and culture.

At the close of the proofs and after you've heard all the evidence, we'll ask Your Honor to consider two overarching questions. The first is, why did those people that I've mentioned including Mrs. Ford, and Edsel Ford, and Mr. Tannahill, and Mr. Rothman, and the thousands of others that have given their time, their money, their family treasures to the museum, why did they do that? We're also going to ask you a second question, is what is the importance of the museum to this community today.

To address the first question, we have to start at the beginning and I don't want to get outside of the proofs really, but I can tell you that in 1883, sort of an interesting time for this city. The city was emerging as a -- as an industrial city.

Historically Belle Isle, I believe, had just opened. I think ground was about to break on Detroit's first skyscraper in the Campus Marsh's area.

But it was also the time that the idea of a public art institute in Detroit first took hold. And it began with a simple letter. There's a Senator named Senator Palmer, a U.S. Senator who sent a letter to Mr. William H. Brierly and he said it was time for this city to have access to art, it was time for them to have an art gallery.

And he was going to do his part. He was going to commit

$10,000 if you could raise 40,000 from other sources. That $40,000 was raised from 40 other individuals. Those 40 other individuals got together, they drafted legislation, had it introduced, saw it passed.

That 1885 act provided that the corporation that they sought to form had to faithfully use the objects that they received for the benefit and purposes of which the corporation was found.

The 1885 act also prohibited that corporation from selling or encumbering its museum art collection and it prohibited that corporation from changing its purposes without legislative approval.

On March 25th, 1885, that museum was founded, the DMA as it was called, the Detroit Museum of Art was founded. Construction began on a building, the first museum building. And that first museum building was actually located at Jefferson and with I-375, I believe is today.

They started gathering works of art together modestly at first. And then construction finally finished on the building and it was open to the public on September 1, 1888.

A practical problem arose thereafter. The city which had been providing funds and which I believe had some board seats on the DMA, was prohibited by a Michigan Supreme Court decision from actually continuing to provide funding.

So what did they do? Well, they switched roles. The

city and the DMA switched roles. They -- the -- the city amended its charter in 1918 to create for an art's commission that provided for a promise of permanent care and maintenance of the collection.

The DMA went out and secured an amendment to the legislation by which it was created that would allow it to transfer its collection to the city provided that the city faithfully use it for the same purposes for which that corporation had been founded.

And that on April 15, 1919, the legislator -- legislature amended the act or approved the amendment of the act. The DMA then gave legal title over to the city but the beneficial interest remained right where it was because that's the nature of this. It remained right where it was with the public.

Thereafter the city in what was then called the Founder's Society by the way because they've changed their name. They worked together to start and build a building that would inspire greater gifts. And that's the building Your Honor visited. They started construction and then on October 7, 1927, that new museum building on Woodward -- Woodward Avenue opened up.

Now over the course of time there was quite a considerable period of time, the city actually did allocate funds to purchase art work fairly robustly at first. But it started to dwindle until around 1950's is when really new

allocations or new -- new allocations for art work ceased all together.

The operational support was uneven until it dwindled down severely and the state actually stepped in. And that was in approximately in the late seventies and eighties.

In the early 1990's that state operational support declined as well. And ultimately in October 7, 2012, the counties passed a millage which we have heard about quite a bit today.

Throughout this entire period of time the public has continued to give its time, money, objects, family treasures to the museum. Why has -- why have so many contributed so much for so long to this museum? Well, let me tell you why.

From 1885 until the present, the public has actually been told that this your museum. This museum collection is yours. The statements are replete throughout the documents of this concept that they are actually the owners. And that the city, and the arts commission, and the DIA Corp. from time to time also acknowledges and said that this collection is actually held in trust.

Now the creditors say that what I've just told you, the history I've told you, the stories I've told you, is actually fiction not fact. What they say is that the evidence will show that the city created the museum, "from scratch". And I'm pulling that from their joint brief at Page 91.

They use pretty vivid and pretty evocative language and they say that "when the "arts commission" was appointed it sprang into action and immediately began building a collection for the city independent from the DMA or its collection.

They say that the transfer by the DIA Corp. in 1919 was not a gift but a sale of assets to the city end quote. Or I'm sorry, that was not a quote, excuse me.

And then they say this chain of events cuts deeply against the DIA Corp. and the Attorney General's description of the arts commission and the DIA as a continuation of the DMA and its alleged trust.

The evidence will show that this isn't correct. The evidence will show that no -- no new museum was created from scratch but rather there was a change in responsibility for the museum.

By way of example, Your Honor, Ralph Harmon Booth, he was the President in January 1919 of the Founder's Society which is again the DMA. That same month in January 1919 the first President of the arts commission was actually Ralph Harmon Booth.

Clyde Burrows was the secretary of the Founder's Society in January of 1919. January 1919 the arts commission secretary was Clyde Burrows.

In 1919 the museum building for the DMA, remember the building that I said was on Jefferson, was actually, and this

is the language from a later version. The museum building was this one, that was the old DMA building. This same building was the museum that housed the collection that they say was started from scratch by the arts commission.

The evidence will show in document after document that the DIA was a continuation of the DMA and that the arts commission merely accepted the duty of carrying on the charitable purposes of the DMA for the benefit of the public.

The very first DIA bulletin was October 1919. That bulletin says right there, the bulletin of the Detroit Institute of Arts of which is the first number takes the place of the bulletin the Detroit Museum of Art.

The evidence will also show that the 1919 conveyance was not an asset sale, but the museum art collection as the creditors would say. And in fact the -- the citations that they refer to deal, I believe, with mortgages and with payments of attorneys fees.

In fact when -- when Your Honor goes back and looks at your video of your bus tour when you went to the museum, you'll remember again coming through the back and there was a dimly lit hallway that you went through. On your left was a brick courtyard where people ate and they had coffee and stuff.

And you went up a set of stairs. And as you went up the set of stairs at the top in lettering was the following. The

Detroit Institute of Arts was founded March 25, 1885 as the Detroit Museum of Art. These words cut deeply against the creditors' position in this case that there was no continuation and that there was no trust.

Now they've largely ignored by the way the distinction between legal ownership and beneficial ownership. And what they've decided to focus on are restrictions. They say that the museum had a policy. It had a policy against accepting works of art with restrictions.

They say that -- and by the way I'm not sure that they point to a single deed where there was a transfer by the DIA Corp. to the city that eliminated the transfers. But they say that that act, the transferring from the DIA Corp. to the city somehow washed away any restrictions that existed and that the actual filing of this Chapter 9 washed away any restrictions that might exist. And they say that -- that enormous wonderful gift by Robert Tannahill, one of the greatest gifts the city has ever seen, those restrictions don't exist.

The evidence will show otherwise. The evidence is going to show that the great preponderance of the gifts, the objects and the museum art collection, were given to the DIA Corp. and not to the city. There's no evidence that the DIA Corp. intended to give the city every single right to liquidate this collection whenever it wanted, however it wanted, for whatever purpose it wanted. In any event the DIA couldn't have done so

because it did not possess the beneficial ownership.

The evidence will also show that the term unrestricted or restricted in museum parlance means something quite different. Museums must be able to carefully and knowledgeably take care of a museum art collection. That's their duty, that's their trust.

And it inhibits their ability to do so if they accept works with restrictions that say, you need to put that work of art on the front of the building forever. Well, that's not a responsible thing to do. And that in museum parlance is what the term restrictive refers to.

The evidence will show that the very act of a sessioning, and a sessioning, Your Honor, is a formal process of taking an object and making it part of a collection. That very act is an act of significance.

The evidence will show that donors didn't give works of art to the city at all directly. But even if the city gave it they didn't give it to the city to place in a building downtown, Coho Hall, at the Coleman Young building.

These donors gave it so that it would be sessioned into the museum art collection of the DIA so that the public would have the ability to access it. That's an act of significance, Your Honor.

The evidence will also show the infirmity in the creditors' claim that restrictions on art work were somehow

washed away either by the transfer from the DIA Corp., to the city, or by the Chapter 9 filing here.

What they essentially are saying is that all the various gifts, whether the Josephine gift, or the Lizzie Palmer gift, any of them, you might as well tear them all up because they are of no meaning. What they're trying to say is that you can take a work such as the work by Edgar Degas and that's Dancers in Repose. Remember Edward Rothman gave that gift. He's the one with the daughters. Rather than give it to his daughters, he gave that to the museum. Send that to Christie's, sell it for the highest price.

The work on the left I didn't discuss earlier, but it's a gift. And it reflects a gift by the children of Allen E. Schwartz and Marianne Schwartz to honor their parents. They might as well sell that one off as well to do much else to get the highest price. These things cut pretty deeply against the creditors' position that there are no restrictions in this case.

Now to address the second question, Your Honor, we need to -- we'll present evidence of the benefits that the museum provides and also what it would mean if the museum actually closed. Annmarie Erickson, she is the executive Vice President of the DIA Corp., she'll testify that this museum is crucial to Detroit.

It provides programming for senior citizens, for

students, for people of all ages. Its innovative programming actually makes it one of the most accessible museums I think in the world in my view.

So the evidence that, and in a city that's declined in population to below a 1,000,000, that the museum in recent years has -- has attracted as many as 600,000 visitors.

You'll hear or take evidence that any sale of the museum art collection would actually put the museum itself in jeopardy. In fact Syncora's own witness, Elizabeth Von Habsburg testified that "art is a universal language". It is, "our culture". And she can't imagine -- can't imagine her city, New York, without fine art. The evidence will show that Detroit without this museum is equally unimaginable.

Your Honor, our time and our role in this proceeding is limited. We have appeared and we participated at really substantial cost for a non-profit so that the parties here would have a full and fair opportunity to understand the issues, to present them to you because the issues are important to this proceeding, they are important to the city.

Consistent with that limited role, and as I said in the beginning we'd ask you to consider two overarching questions. And at the end of the proofs, we'll suggest an answer to those. And I don't think they'll be a surprise to anybody.

We'll say that the city, and certainly the creditors can't force a sale of museum art collection because it's held

in trust and the public is the beneficial owner, period. That there are no restrictions and that this museum belongs to stay right where it is for all the reasons explained in our pre-trial brief.

As to the second question we'll say that the museum isn't the glittering link to the history or the old time of this city as the creditors have said in the past. But that it is in fact key to our present and our future.

And I said that the Court would -- we would ask the Court to consider those questions, but I didn't say you would actually have to answer each of them. And that's because as Your Honor knows, that's not the issue.

The issue is whether the debtor city here has made the adequate showing that this settlement is within the range of reasonableness. The evidence will show that it is.

Now Mr. Bennett yesterday said that he wouldn't opine on the merits and I understand why he won't. And that's fine, so be it. But I have 130 years of history, I've got Michigan case law on my side, and I've got the Attorney General all saying that this collection can't be used to satisfy creditor debts and obligations.

I'll note that the evidence will show that if the settlement is not approved, and if the museum art collection is placed in jeopardy, the DIA Corp. will fight on an object by object by basis if necessary. And it has to do so because

this collection doesn't belong to anybody except the public. It has to do so because if it doesn't and it allows the proposition that's being presented to Your Honor to actually take hold, that somehow charitable gifts to a municipality are to be treated just as any other, to be liquidated and used, will chill philanthropic giving for generations to come in a city that needs that philanthropic giving more than ever.

In closing, it's important to emphasize again that this case is about respecting charitable donations and respecting the people's right to education and culture. To that end I would ask the Court to again at the close of the proofs and as it hears the evidence in this case, remember back to your bus tour.

You went through various parts of town, some were blighted, some were in decay, some were showing signs of rebirth. And I'm not sure exactly which path you went because I wasn't on the bus, but the video had you coming up Woodward Avenue. That was probably showing the first signs of construction of the M-1 rail. And as you went past the museum building, I'm hoping Your Honor looked out the right hand windows and saw what was written on the front of the building. Dedicated by the people of Detroit to the knowledge and enjoyment of art.

As you hear the testimony and consider the evidence, I'd ask the Court to consider what do those pivotal words mean.

Not just as it pertains to this settlement, but as to the entire case because they are many and varied and there are many issues upon which you must reflect.

I would ask the Court to consider what would it mean if that statement of promise and ambition and hope were rendered a dead letter. We would ask the Court to consider what would charity mean and what would culture mean if the creditors have their way. Thank you.

THE COURT: Thank you, sir.

MR. ALBERTS: Good morning, Your Honor. Sam Alberts from Dentons on behalf of the Official Committee of Retirees and may it please the Court.

The committee rises in support of confirmation of the city's sixth amended plan of adjustment. As the Court may know, the committee represents more than 23,000 current retirees who work to preserve, protect, and enhance the City of Detroit.

These men and women uniformed and non-uniformed workers sacrifice private sector wages and in certain cases, literally life and limb in exchange for a fundamental promise that when they retired they would receive a modest pension and health care for themselves and their spouses for their lives.

That promise was clear and immutable. By voting in favor of the plan under Classes 10, 11, and 12, retirees, however, if the plan is confirmed, will have a direct and fundamental

change to those promises made by the city.

The effect for general services retirees or GRS service retirees will be particularly significant. These general service retirees of whom more than 50% who voted on the plan live in Detroit proper, receive an average of less than $20,000 a year in annual pension benefits.

These people who I speak of worked as arborists, water and sewer workers, garage mechanics, lawyers and government staff workers among others. Under the plan, and this is without dispute, every GRS retiree will see an immediate 4.5% reduction to their monthly pension benefits.

In addition these retirees will lose a 2.25% annual escalator which as the city has explained, is designed to help these pensions keep pace somewhat with inflation. As the evidence will further show, thousands of these general services workers will have their pensions reduced further to cover alleged interest overpayments with respect to their individual defined contribution annuity saving account funds or ASF funds.

I say alleged because as you will hear from several of the individual retiree plan objectors, these payments were determined without any of their input and were made according to contract and city ordinance.

Let’s talk about the effect of these. And I’m not talking about hardship. I’m just talking about the effect of

the cuts themselves. If you could pull up slide 2.5.

As to the general service retirees, when you add the 4.5% immediate reduction with the cost of living adjustment which affects younger retirees because there is a effect over time of what they're losing, and the ASF. You see that from what they are receiving or what they were receiving pre-bankruptcy to what they are receiving under the plan, has a serious cumulative effect.

If you just look at the middle bar, and those on the very top line are the number of retirees. And the bottom line shows the percent of reduction in their benefits. You see that for that middle band of 3,155. We're talking about a 15 to 20% reduction in their benefits.

And these are for people who on average have pensions of $19,000 or less. A few outliers have very large reductions, and a few have zero reductions but they -- they are explained and -- and the testimony will explain in more detail how these numbers are created.

Now --

THE COURT: Sir, can I ask you to again point that microphone more -- more towards you as best you can?

MR. ALBERTS: Yes. Is this better, Your Honor?

THE COURT: You just need to slide it this way a little bit more based on where you --

MR. ALBERTS: How about this?

THE COURT: Okay. But now just point it right at you. Good.

MR. ALBERTS: All right.

THE COURT: Yeah.

MR. ALBERTS: Testing. Now, as to the brave men and women who put their lives on the line every day, Detroit's retired police and firefighters, or the PFRS retirees, they will see a 55% reduction in their annual escalators.

Now remember these are workers who on average receive $30,000 a year in pension, who typically retire earlier due to mandatory requirements and do not receive Social Security benefits or Social Security increases. So this is not an insignificant sacrifice.

Let's take a look at how this affects the PFRS retirees. Now we put two charts here, Your Honor, because some of the police and fire retirees receive a compound COLA and some do not.

The differences though show that the reductions to their value, the pension value, is very significant particularly as we're talking about retirees who are 70 years old or under. And you can see there, the older you get the less value a COLA is worth because presumably people who are older will not live as many years.

All right. The core changes alone are worth approximately seventy -- seven hundred -- $700,000,000 under

the city's 6.75 proposed rate under the plan. And more than -- more than 1.2 billion dollars if one were to use a riskless rate which we -- which the evidence will show that is one of the viable options.

Yet reductions to pensions tell only part of the story of the challenges and the reductions to the benefits of retirees. Now the objectors keep referring to the pensioners. Well, these retirees are more than just pensioners. They received more than just a pension promise.

They received a promise for valuable health care benefits going forward for not only themselves, but for their spouses. And in fact, Your Honor, the evidence will show that the reductions of these benefits are significance of the -- in themselves, but the plan itself is eviscerated under the plan. The plan health care.

The city in effect is getting out of supplying health care benefits to retirees under this plan. Instead what the city is doing is putting money into two VEBA trusts. One for the benefit of police and fire, one for the benefit of the general service retirees. The total amount of that at present is $450,000,000. And the amounts to put into the VEBA are split fairly equally, 51% for the police and fire, and 49% to the general service retirees.

Now prior to bankruptcy, the city provided more than a dozen options for retirees who were both Medicare eligible and

those who were not. Now I want to pause here a second, Your Honor, people who are not Medicare eligible are not only those that are not -- are under the age of 65. We're also talking about the people who are over the age of 65, some police and fire who are not eligible for Medicare.

Now the effect of this is pretty significant. Because once you hit the age of 65, it is very difficult, in fact it's very difficult for anybody who is retired to get insurance. They pay -- they typically pay much higher premiums. But as you get older, it is a much more difficult and challenging request for them.

Now as I mentioned, under the plan the promise of valuable city health care is no more. And no more is the city's requirement to administer those programs. Rather as I mentioned, the city will be putting forward the two VEBAs.

Now I'd like to show the difference, Your Honor, between what retirees were projected to receive under the health care structure that the city had in place through 2013 moving forward versus what can be gained on the notes themselves. If we could put up that slide please.

All right, Your Honor. In red are the OPEB expenditures that were projected by the city for each year for just the first ten years. And as you will see, the amount starts at approximately $173,000,000 a year and moves up to more than $250,000,000 a year.

Under the plan the city is providing the notes as I mentioned. Those notes because they are interest only for the first ten years, will yield $18,000,000. That is the difference in what retirees are going to get under the notes.

Now one of the things that the VEBA trusts are permitted to do, is to monetize those notes in an effort to increase the value that is received. But, Your Honor, if one were just to take the interest off of those notes --

A VOICE: So we had --

MR. ALBERTS: This is --

A VOICE: And --

THE COURT: Who is on the phone?

A VOICE: And I listed the wrong address for them.

THE COURT: Turn the volume way down. Sorry for that, sir, go ahead.

MR. ALBERTS: Thank you. That is what would be yielded in the first ten years. That is a significant change. Some of the changes have occurred during this case as the Court is aware.

But that does not mean that because what the Court -- what -- what the city did during the case would be what was necessarily under the plan. In fact, Your Honor, if the blue bar were to stay the same, the benefits that would be available or the money available to retirees would be significantly less than even what is being -- what the city

has agreed to provide during the case by almost half.

Now, I want to address the assertions made by some of the objecting parties that the reductions in benefits to retirees are not significant. I would submit, Your Honor, that the benefit reductions to these retirees are by any measurement life changing.

As noted all retirees will experience fundamental and drastic reductions in city sponsored health care and will experience pain caused by the fundamental breach to their pension promise. Notwithstanding a few objecting parties, not with -- excuse me, Your Honor.

These objecting parties, somewhat remarkably, include the counties of Wayne, Macomb, and Oakland where many of the retirees now live and whose water and sewer rate payers will benefit from the elimination of the DWSD OPEB costs from those savings that I just pointed on.

I'd like to show a chart actually of where these retirees live. I mentioned earlier, Your Honor, that fifty -- more than 50% of the retirees who voted for the plan, actually on the plan, live in Detroit proper. Those are the GRS employees.

Here you will see, Your Honor, that a full 73 1/2% live in Wayne, Macomb, and Oakland and retirees of Detroit are within that group. Just a moment, Your Honor.

Your Honor, I'd like to show where the funds are coming

for -- from with respect to the pension payments themselves. If we could put slide 10 up.

Your Honor, the -- these -- the numbers for this will be shown at trial. But this will give you a sense of where the money is coming from for the first ten years of the pension contributions.

And as you can see, with respect -- we have two -- two levels here. The first level is for the general service pension contributions. And the second level is for the police and fire contributions.

Starting with the general service contributions. The most sizeable portion, the $428,000,000 you see come from DWSD. Then, Your Honor, we have $98,000,000 from the state through the settlement. And 31,000,000 from the UTGOs, 45,000,000 from the DT -- the DIA, and the other is city funds. With respect to the PFRS, all of the monies come from a non-city source they're either state or foundation money.

Okay. I think Mr. Bennett did a very good and thorough job of showing that if there is difference in treatment with respect to the pensions and other unsecured claim holders, it was not nearly in the range that those other claim holders assert. Nowhere near 50% or nearly anywhere near 50% or greater of what is being recovered by the COPS holders.

Now, Your Honor, I would like to also weigh in on why the treatment for retirees is different, at least -- and on the

elements. And -- and -- and something that hasn't been touched on as well with respect to what could be if we did not reach this accommodation with the city.

First, in contrast to the claim of other creditors, including the COPS and the counties, pension claims as the city has stated, has a special benefit of the Michigan constitution pension clause.

Now we are aware and we're mindful of the Court's December 3rd ruling on that issue. And we are also mindful that certain people might not think that that -- that the protections provided by the Michigan constitution and this Court's ruling would be reversed. But there is significant litigation risk.

And one can see the fact of that significant litigation risk by the fact that the state has agreed to contribute what it did in exchange for releases from retirees from pursuing the claims not only against the city, but against the state.

Second, Your Honor, the treatment of retirees cannot merely be viewed through the prism of the treatment of the pension claims. Rather, one must consider the treatment of other -- the other claim which is the OPEB claim.

In fact as the evidence will show retiree pensions and even more so OPEB claims, dwarf all other unsecured claims in this case. If you could put up the slide.

This is one stack. On the left hand side you will see

the claims and what we're doing here is we are taking the numbers as provided in the disclosure statement and plan. And we have formulated the percentages.

And you will see that we have given the COPS holders the full amount -- we've assumed the full amount of their claim as allowed at 1.4 billion dollars. We similarly give amounts for the LTGOs, the UTGOs, and some other amounts.

What we also do is we provide what the pensions have been agreed to under the plan. For the PFRS it's 1.25 billion. And for the DGRS or the GRS, 1.879 billion.

And then you can see below that an amount for the OPEB claim. And the OPEB claim by itself at the agreed amount with the city at 4.3 billion dollars, is worth almost 45%. The pension and the OPEB combined are 78%.

Now these percentages increase, Your Honor, if the committee's position on its claims were to prevail which absent an agreement between the city and the committee, the committee would have pursued vigorously. We are prepared to demonstrate that the amount of the claims actually for both the PFRS and the TGRS could be significantly higher at 3.8 billion and 3.54 billion respectively. And the OPEB claim would be worth $8,000,000,000.

And so the amount, Your Honor, we believe that has been settled, and that's effectively what we're talking about here is a settlement between the committee and other retiree

interests and the city, has reduced the amount that the committee believes would be -- would be the entitlement for retirees.

And, Your Honor, particularly when we’re talking about the OPEB claim, the amount of that claim by shrinking it almost in half provides real value to the COPS holders because they are with the OPEB claim sharing pari passu in the recoveries.

Now it should be noted, Your Honor, that the claim for OPEB could be enhanced if the COPS holders claims are deemed disallowed in whole or in part. There is a provision for that.

Now if we could just go to the OPEB settlement ranges. I just wanted to -- the next slide, please. I just want to touch on this for a moment. Because there may be an assertion made that the proof of claim that was filed by the committee was for less than the settlement amount. And if you look at columns 2 and 3, Your Honor can see that number 2 is the proof of claim amount that was filed. And number 3 is what the plan of adjustment provides for.

And it’s without dispute that the plan of adjustment agreed to amount is more. But there are a few reasons for that, Your Honor. Number one, when the proof of claim was filed the committee did not have information on what is known by the city as the opt outs. These are people who currently

were not receiving health care benefits from the city but had a right to receive that.

And let’s be clear about the rights. Those rights for retirees are embedded in collective bargaining agreements. They’re embedded in the city’s municipal ordinance as well. Those rights are vested.

That issue has never been challenged by the city. In fact as the Court will recall, when we brought the litigation against the city twice, the city never challenged the vested nature of the rights. What they asserted was this Court didn’t have jurisdiction. But that was never in dispute what rights of the parties there were.

Your Honor, I want to go back to the slide for a second. If you put those opt ins back in, the claim amount just by the calculation itself, would have gone up to 4.5 billion dollars. And as you will hear in testimony from the city’s witness, Ms. Taranto, that all of these ranges are within the range of reasonable, all of these bars, including our $8,000,000,000 bar.

So that was a significant settlement. It was a significant settlement in two levels. One, by reducing the claim to 4.3 billion dollars and then accepting the treatment under the claim.

And, Your Honor, a third rationale for the treatment of the retirees with respect to the pension was stated by the

city as a fundamental business justification. And as the evidence will show, Your Honor, Detroit active employees actually do care about how the city treats its retirees.

Moreover, Your Honor, more than 70% of retirees live in the Detroit Metro area with more than 50% of the GRS retirees who voted on the plan living in Detroit proper. This fact is important, Your Honor. As these people and their personal income have a direct impact on the local economy.

But the retirees, Your Honor, are not nearly economic participants in the local community. They are citizens here and they are critical threads in the warp and wolf of Detroit.

Having had the honor of representing the committee, Your Honor, my colleagues and I have come to meet and speak with dozens of Detroit retirees if not hundreds. As such we have developed a profound respect for these persons and the sacrifices that they have made for the city.

And I can say confidently, Your Honor, that no retiree is happy about seeing their pensions cut and their health care benefits slashed. Some in fact find aspects of the plan unlawful and improper. However, it is hard to find one who does not have a warmth for the city and a hope for its future.

At bottom retirees understand that they are being called upon to sacrifice for the city that they served once more. Some have done so willingly, some have done under a feeling of compulsion that voting against the plan would have triggered

far worse of an alternative. And others still not and will not accept the plan's proposed treatment.

However, as classes retirees have voted both in requisite number and amount in favor of the proposed treatment under the plan. The committee stands with these retirees and urges the Court to approve confirmation of the plan and to overrule the objections of the plan. Thank you, Your Honor.

THE COURT: Thank you, sir.

MR. KIESELSTEIN: My turn, Judge.

THE COURT: It looks like it.

MR. KIESELSTEIN: Good morning, Your Honor. Marc Kieselstein, Kirkland and Ellis, LLP on behalf of Syncora.

Your Honor, the first thing I wanted to do was to thank the Court and your staff. I think that's probably the one thing I'll say today that everyone in this room will hopefully agree with. We've noted the armies and brigades and battalions of lawyers facing this way and we have you wildly outnumbered.

We appreciate all the energy that the Court has brought to this case. I can only imagine the very long hours and the pressures that have been on your -- on your staff. And we thought it was only right and proper to acknowledge that from the get go.

Now, Your Honor, these are extremely important days. They're important days for the City of Detroit, they're

important days in the history of the United States Bankruptcy Code, but first and foremost, these are crucially important days for the rule of law.

For -- for now the debtor and its plan of adjustment is in the dock of justice. And today is the day of reckoning for our plan. The evidence will show it's so flawed in its structure, so dismissive of basic duties, and so lacking in evidentiary support that it cannot be confirmed without doing serious mayhem to the rule of law, popular demand notwithstanding.

The evidence will also show that it didn't have to be this way. Instead there was and still is a win win plan for all stakeholders that could be crafted and that would not pit financial creditors against actives and retirees.

Now today I intend to lay out some, but by no means all of the ways the evidence will demonstrate that this plan unfairly discriminates, fails the best interest test, and is not fair and equitable. And I want to start at the beginning.

Now at the beginning the debtor said a lot of the right things. It spoke about shared sacrifice fairly apportioned. The June 2013 proposal of the creditors said and I quote, "shared sacrifice would be required from all stakeholders to achieve the city's dual and complimentary goals of maximizing returns for its stakeholder constituencies while simultaneously establishing the framework for a healthy and

growing Detroit going forward".

Now it wasn't sequenced the way Mr. Bennett did in his opening. These would dual and complimentary goals. And that same proposal by the way, talked about pro rata distributions to all unsecured creditors.

Page 109 of the proposal made clear that all unsecured claims, gold bonds, COPS, pension claims, OPEB claims, and other general unsecured claims would receive "a pro rata relative to all unsecured claims principal amount of the notes".

Now last year Mr. Orr also talked about all assets being on the table. He said and I quote, "I have a fiduciary obligation to account for all assets of the City of Detroit. The foremost among them might very well be the DIA".

And as recently as December of 2013, Mr. Orr acknowledged that all unsecured creditors had the same rights to distributions in bankruptcy, the human dimension notwithstanding. And we'll come back to the human dimension in a few minutes.

Now that was then. Now we have a plan that engages in epic levels of discrimination between creditors of equal rank and the art collection has been pulled off the table for what the evidence will show is a relative song. So what on earth happened?

Well, for today I'm going to leave that question to the

historians because it doesn't matter if the plan was brought into this world by a mediation process we take issue with, or whether it was delivered by the stork. Viewed strictly on its own terms in light of all available evidence the plan can't be confirmed.

And as I will discuss, not only has discovery revealed a failure across the board, discovery has also revealed that the debtor in many instances gave itself a hall pass from even attempting to develop basic evidence.

Now first I will discuss the plan's unfair discrimination against Classes 9 and 14 under both the Aztec test and the Markell test. Second, I will discuss the plan's failure to satisfy the best interest of creditors test and the debtor's abject failure to even bother trying. And third and finally, I will discuss the plan's failure to satisfy the fair and equitable test.

Now, Your Honor, in the interest of time and as an act of clemency for a captive audience, I won't touch on good faith, feasibility, and our miscellaneous technical objections today. There will be plenty of evidence during the trial on those issues and we'll plan to discuss those at closing.

Your Honor, as we ponder the -- the debtor's evidentiary void in so many areas, I was reminded of the theological doctrine fide sola, by faith alone. And I remembered a quote from St. Thomas Aquinas. He famously said, where faith

exists, no explanation is necessary. And where faith is absent, no explanation is possible.

But we are not in a house of worship or an ecclesiastical Court, we are in an American Court of law. There are no verities, there are no truths we hold to be self evident, there is no received wisdom, there is no gospel according to Mr. Buckfire or Mr. Orr. And nothing is true simply because the debtor fervently desires that it be true.

Now the evidentiary record and its many wide open spaces will make plain the impossible position the Court has been placed in. One where the Court is asked by faith alone to find that the debtor has met its many burdens.

And I want to preview just some of those articles of faith the debtor will ask this Court to blindly accept. First, additional reductions in pension recoveries would adversely impact the morale, performance, and retention rate of active employees. That article of faith goes to unfair discrimination.

The city's pension obligations alone are so large they would eradicate any meaningful recovery for creditors outside of Chapter 9. That article of faith goes to best interest.

The retirement systems will invest in assets more conservatively after the debtor emerges from bankruptcy. That article of faith goes to unfair discrimination and fair and equitable.

The RJA process would yield inferior recoveries for all creditors. That article of faith goes to best interest.

Taxes cannot be raised in Detroit without having a net negative impact on revenues. That article of faith goes to best interest and fair and equitable.

Delinquency rates will become unmanageable and there will be mass immigration if tax rates go up. That article of faith goes to best interest and fair and equitable.

All grand bargain proceeds had to be paid exclusively to Classes 10 and 11 because the foundations and the state insisted on it. That article of faith goes to unfair discrimination and fair and equitable.

The debtor has reasonably determined that there is a credible argument that the art collection is subject to an implied charitable trust. That article of faith goes to fair and equitable.

And finally the museum assets are subject to a great many donor restrictions that would prevent a sale. That article of faith goes to fair and equitable.

Now these are make or break arguments and there are others. And the debtor asserts them based on its say so and nothing more. And I'll speak to those in greater detail as I go through my presentation.

And, Your Honor, a couple of table setters that until yesterday I didn't think were particularly controversial.

First, it's absolutely true that Section 904 of the Code restricts a Court's ability to interfere with municipal operations.

But the cases are also clear that a Chapter 9 debtor consents to a Bankruptcy Court's jurisdiction to adjudicate the confirmability of a plan of adjustment. I thought I heard Mr. Bennett try to flip that around to suggest that 904 somehow trumps the 1129 confirmation requirements. It doesn't.

The obligation not to discriminate, to satisfy best interest, to treat creditors fairly and equitably, none of those are blotted out by Section 904 of the Code, or by any Michigan law limiting creditor recoveries. When a Chapter 9 debtor or any debtor gets the benefits of bankruptcy, the automatic stay, the breathing spell, the fresh start, it also takes on the burdens.

And those burdens include more than thumbing your nose at your rejecting classes and saying that outside of bankruptcy the creditors couldn't force this or that and can only get zero. We're not outside of bankruptcy, we're in bankruptcy. The debtor can impair contracts and compromise claims but what it can't do is inflict unnecessary and outside losses on disfavored classes.

Second, although the plan consists of a number of settlements, including of course the so-called grand bargain,

the law is also clear that the deferential 9019 standards in no way lessen the debtor’s burden of proof on each and every confirmation element. There are --

THE COURT: I want to go back to your argument about the role of 904.

MR. KIESELSTEIN: Yes.

THE COURT: In the confirmation process.

MR. KIESELSTEIN: Uh-huh.

THE COURT: What -- what is your position on whether 904 has any role to play in interpreting or applying the confirmation standards --

MR. KIESELSTEIN: Uh-huh.

THE COURT: -- in -- in a Chapter 9 case?

MR. KIESELSTEIN: We don’t think it has a role, Your Honor. We think --

THE COURT: None.

MR. KIESELSTEIN: No role, Your Honor. I mean if -- if -- if there was a plan that said, and I don’t know if it was the debtor’s own plan, I don’t know why it would say it, that we will be forced to sell things, or lien things up. 904 says a Court can’t force a city to do that.

A plan can’t force a city to do those things either but that’s a different question from whether it’s fair and equitable for a city to opt not to do certain things that it could do. It’s the difference between whether 904 means a

debtor can't be dragged kicking and screaming to do something as opposed to whether a debtor has a duty under the fair and equitable standard to take certain measures to minimize creditor losses.

THE COURT: And you don't think that Section 904 requires the Court to employ a somewhat more differential standard in for example, unfair discrimination, or fair and equitable.

MR. KIESELSTEIN: We certainly do not, Your Honor. We think the objective Trier of Fact has to find that the debtor has carried its burden by a preponderance of the evidence. That's why I'm -- I'm talking about 9019 enormous business judgment deference does not translate over into the 1129 or 943 elements. And we think the case law is clear on that point.

So, Your Honor, with regard to 9019, there are no business judgment presumptions in a contested confirmation hearing. And Rule 9019 is not a Trojan horse to slip past the fortifications of Section 1129 and 943.

Mr. Bennett spent a great deal of time on the lowest range of reasonableness and such. Now that tells me the debtor plans to do exactly what you cannot do, conflate the subjective debtor friendly deferential 9019 standard with the coldly objective non-deferential standards of 943 and 1129.

So, for example, with respect to the art, we believe the

evidence will show the debtor did so little to vouch safe the implied trust argument, or the donor restriction issue and ran so fast and so far from any alternative proposals with respect to the art that it can't satisfy even the lenient 9019 standard.

But even if Your Honor felt differently, that has absolutely nothing to do with the debtor's need to satisfy the confirmation standards. It reminds me of that old Hebrew National ad campaign from 20 years ago. It said, we're Kosher. We have to answer to an even higher authority.

And 9019 and 1129 are like that. 1129 is a higher standard, it's a higher authority. You can't get around it with 9019.

So with that groundwork laid, Your Honor, let me turn to the key confirmation elements.

THE COURT: Well, how would you articulate what that difference is that you assert?

MR. KIESELSTEIN: Between 9019 and 1129? 9019 as I understand it is basically the equivalent of business judgment rule protection that a Delaware director would get for a decision that they made, did they go through a reasonable process, did they inform themselves, et cetera. And if they -- those process answers are yes, the debtor looked into it, they poked around, they -- they, you know, they asked a few questions, that okay the -- the Court does not second guess

the debtor's business judgment there. That had --

THE COURT: That doesn't feel like the standard that I applied in reviewing the settlements in this case so far.

MR. KIESELSTEIN: Oh, no, certainly not, Your Honor. But that's still not the same as the 1129 standards. The 9019 standard we don't contest this, has an element of deference in it, no two ways about it. That's -- that's how it works.

And I think even when Your Honor turned down the first or second swap settlement, I can't remember now, it was because Your Honor found that that low bar had not been satisfied, not that viewed straight up objectively that the debtor was wrong, but the debtor hadn't satisfied the lowest range of reasonableness. That's not the test here. That's -- that's a -- a trap for the unwary, Judge. That's an end around. And we don't think it's appropriate.

So, Your Honor, if I may. With that ground work laid, let's turn to the question of unfair discrimination. Now discrimination is relevant of course because the debtor seeks to cram down Classes 9 and 14 --

THE COURT: We have to pause one more time.

MR. KIESELSTEIN: Yes.

THE COURT: I want to be sure I understand what you're arguing here.

MR. KIESELSTEIN: Sure.

THE COURT: Under -- under what kinds of

circumstances --

MR. KIESELSTEIN: Uh-huh.

THE COURT: Either generally or specifically would a Court in a Chapter 9 case hold that a settlement is fair and reasonable under 9019 but that the consequences of that settlement to other creditors are not fair and equitable or result in unfair discrimination in the confirmation context?

MR. KIESELSTEIN: Well, this goes --

THE COURT: That's what I'm having a hard time comprehending.

MR. KIESELSTEIN: This goes to the whole question of -- of a settlement being so broad and so inclusive or having such ramifications that it in essence amounts to a sub rosa plan. And settlements can be a way to circumvent --

THE COURT: Okay. But that's not an answer to my question.

MR. KIESELSTEIN: I'm sorry, could you re-ask your question?

THE COURT: I'm looking for what would it be, what -- what circumstance would there be about a settlement that the Court finds is fair and reasonable in a 9019 context.

MR. KIESELSTEIN: Sure.

THE COURT: But that would result in unfairness either in the context of fair and equitable or unfairness in the context of unfair discrimination.

MR. KIESELSTEIN: Very simple.

THE COURT: Give me -- give me

MR. KIESELSTEIN: The grand -- the grand bargain --

THE COURT: One -- one thing to think about that answers that question.

MR. KIESELSTEIN: Your Honor, the grand bargain. The grand bargain if it was a two party dispute between the retirees and the city or three party, the DIA, if you were to say they could settle this dispute and it's fine because it doesn't adversely impact the rights of others, we would argue that that grand bargain is devastating to our rights, both because every single penny of proceeds goes only to Classes 10 and 11 and none goes to any other class, including the COPS class.

And two, it takes the art off the table permanently without us having had the opportunity to say, wait a minute, that's not fair and equitable.

THE COURT: So the answer -- so you're arguing the answer to my question is, a settlement might be fair and reasonable as among the parties to it.

MR. KIESELSTEIN: Uh-huh.

THE COURT: But result in a consequence to other parties that is arguably unfair, or is unfair.

MR. KIESELSTEIN: Precisely, Your Honor. And in fact it's a live example in this case because after the grand

bargain was cut, the city has kind of come to us --

THE COURT: Well, but -- but answer this question for me.

MR. KIESELSTEIN: Sure.

THE COURT: Isn't it the case --

MR. KIESELSTEIN: Uh-huh.

THE COURT: -- that every time, every single time there is a settlement in a bankruptcy case --

MR. KIESELSTEIN: Uh-huh.

THE COURT: -- between a debtor and one creditor which results in that creditor getting more or the debtor getting less than it might otherwise, that potentially adversely impacts all the other creditors in the case. Isn't that so?

MR. KIESELSTEIN: It's all a matter of degree, Your Honor. Yes, does every settlement has some potential tangential impact on -- on another creditor.

THE COURT: Oh, not tangential, direct.

MR. KIESELSTEIN: Well, I -- I -- I would have to think what the example was to tell you if I thought it was on one side of the line or another. But if someone came in and settled their claim for, you know, X dollars and not Y dollars and by definition that means that there is a larger claim pool and more dilution for everybody else, yes, you could suggest that that -- that's impactful. Everything is impactful in a

bankruptcy as we all know.

THE COURT: I mean --

MR. KIESELSTEIN: But some things are devastatingly impactful and other things are marginally impactful. And that's why you have the notion of -- of sort of sub rosa plans, wait a minute these --

THE COURT: But if the settlement is reasonable based on an objective evaluation of the strengths and weaknesses of the claims, and defenses, and the complexity, and the length, and --

MR. KIESELSTEIN: Uh-huh.

THE COURT: -- and the cost and all of that stuff we consider under 9019 --

MR. KIESELSTEIN: Right.

THE COURT: Would a Court ever say no to that settlement just because it's going to have a devastating impact on the other creditors?

MR. KIESELSTEIN: Absolutely, absolutely.

THE COURT: I'm not familiar with that concept.

MR. KIESELSTEIN: Well, you know, I think the facts will show, I think they're -- and I said there's nothing that's self evident, so here I go contradicting myself. I think it's self evident that the grand bargain obviously favors one group of creditors as opposed to another. We get no proceeds.

The -- the pension claim holders get 100% of the proceeds. I don't think it's stretch to say that that's -- the evidence will show that that favors one group rather than another. So I mean in that -- in that circumstance, you know, that is where the line is crossed in my view.

THE COURT: Okay.

MR. KIESELSTEIN: So, Your Honor, back to the question of unfair discrimination. Here again there's a cram down of Classes 9 and 4. Those creditors are receiving far less than other unsecured creditors. I'll get to the new math post solicitation in a minute.

Now on its face the plan provides vastly disparate treatment for creditors. Fifty-nine and 60% for PFRS and GRS pension claims, only 10 and 13 cents for COPS claims and general unsecured claims, not our evidence.

That's clearly stated in the disclosure statement notwithstanding the furious and troubling back pedaling we've seen by the debtor both in its pre-trial brief and as a large part of Mr. Bennett's opening. And I'll touch on that in a bit.

Now this Court noted in early August that the debtor's plan engages in "very significant discrimination". And that the debtor was going to need to lay out a "business justification" for that discrimination.

And Mr. Orr agreed, watch for yourself.

(Video Being at Played at 11:32 a.m.; Concluded at 11:32 a.m.)

Now Mr. Orr was the debtor's 30(b)(6) witness. And that 30(b)(6) witness' testimony is absolutely considered a binding admission. That's how 30(b)(6) works.

Now Mr. Bennett cannot walk that back from the podium. This means that there is no dispute between the parties that significant discrimination exists. The debtor is bound by Mr. Orr's admission on this point.

But as the evidence will show, and Mr. Wagner will speak to this, very significant discrimination is actually a model of understatement. The discrimination is far more pronounced than the debtor lets on.

Now despite its previous admission on the subject though in its pre-trial brief and as we heard yesterday and today, the debtor now attempts to argue that the discrimination is not significant and that its own Court sanctioned disclosure statement substantially overstates pension claim recoveries in Classes 10 and 11.

On Pages 27 through 30 of the debtor's pre-trial brief the debtor argues that a more accurate calculation of the pension claims would utilize a lower or risk free discount rate. And we heard a lot about that this morning.

So the result of that would be by dint of arithmetic to substantially increase the size of the pension claims

resulting in significantly decreased recoveries. Now as an aside the evidence will show that municipal pension funds simply don't calculate their liabilities using any of the kind of rates that Mr. Bennett talked about. I know the evidence to that effect.

Calculating the pension claim using the debtor's new math and excluding the grand bargain proceeds would result in 20% recoveries for GRS and single digit recoveries for PFRS. These are astonishing numbers.

But what is also astonishing is that the debtor never once mentioned its secret view that a risk free rate or some lower rate should be applied to pension claims in either the big disclosure statement or in the plain English disclosure statement which was created for the expressed purpose of explaining to retirees precisely what they are getting.

The debtor disclosed 59 and 60% recoveries and made no changes to those numbers before the voting deadline. Now I just heard Mr. Bennett say, I believe, that there are, "clearer and more accurate" ways to quantify the claim and the recoveries.

If so, why weren't they in the disclosure statement? Now it wasn't until after seeing objections, expert reports, and other evidence that will make clear the plan is unconfirmable on the basis of unfair discrimination. Only then did the debtor disclose its heart of heart's view on the actual

recovery for the retirees.

Now this is discrimination three card Monty, Your Honor. Either this new argument is just a continued effort to escape Mr. Orr's binding admission, or there were very significant omissions to creditors in the disclosure statement.

Now having obtained this Court's blessing to a disclosure statement that pension claimants were getting 59 and 60 cents in Classes 10 and 11, the debtor must be judicially estopped from changing its position now. We'll take that up at the appropriate time when the evidence comes in.

But let's look at the real facts on unfair discrimination. Now in the coming weeks the evidence will show that despite an ever changing list of justification, there is no business justification for any let alone the massive discrimination in the plan.

Now as the Court is aware, there are two tests for determining whether a plan discriminates unfairly, Aztec and Markell, no question the law is a bit confused in this area. But it makes no never mind. Because the -- the plan fails both discrimination tests with flying colors.

And let's talk Aztec first. Now Aztec is a four part test. The debtor must carry its burden as to each part. Now we cover them all in our pre-trial brief, but I'm only going to focus on the first two parts because they are show stoppers.

By the way extreme is not the standard, although I think Mr. Bennett just invented that this morning. The discrimination has to be supported by a reasonable basis as independently and objectively determined by the Trier of Fact.

Put another way it doesn't matter that a debtor thinks or believes in good faith that the discrimination is reasonable. And the discrimination must be necessary to confirm the plan.

Now Your Honor has recognized the need for a reasonable basis noting that, "in the case law I'm familiar with, where the issue is the business justification for whatever discrimination is in the plan, it is determined based on the business needs of the debtor". So not only must a debtor offer a reasonable business justification -- justification for discriminating, it must have actually relied on it. You can't discriminate first and ask questions or find answers later. But put another way a debtor has to know the business rationale for its discrimination in advance, not in arrears.

So what does has the debtor said about the reasonableness of its basis for discriminating? Well, it's probably easier to ask what hasn't the debtor said. Trying to focus on the debtor's discrimination case is a bit like looking through a kaleidoscope. Every time you think you've got the picture, the debtor turns the handle and the landscape changes entirely.

Let's start with Mr. Orr. What did Mr. Orr again as the

debtor’s 30(b)(6) witness say under oath about the decision to discriminate? Well, he cited four reasons and only four reasons to justify the discrimination.

Some we had never heard before. And remember this is July of this year. Other rationales that the debtor had previously raised went entirely unmentioned.

He said he considered the human dimension, the city’s covenant with retirees, the potential invalidity of the COPS, and the assets currently in the retirement systems. That’s it.

Now if you line that up with the debtor’s recently filed pre-trial brief, you will find very little overlap. So we remain confused as to what the debtor actually intends to try to prove. What the evidence will show is that to this day the debtor is still groping in the dark for some post hoc justification of its initial decision to discriminate.

Now Mr. Orr spent a great deal of time talking about the human dimension as a justification for discrimination. What is the human dimension? Listen for yourself.

(Video Being Played at 11:39 a.m.; Concluded at 11:39 a.m.)

Now all of us being human, we all appreciate the human dimension, Your Honor. But let’s remember the rule of law. What does this have to do with an objective business justification for discrimination under the plan?

In fact as I noted at the outset, Mr. Orr himself admitted that the human dimension is a legally impermissible basis for discrimination. Here is a clip.

(Video Being Played at 11:40 a.m.; Concluded at 11:41 a.m.)

So, Your Honor, in between December of 2013 at his deposition the human dimension took on a whole new dimension. Where once it was legally insufficient to justify discrimination, now we have Mr. Orr as a 30(b)(6) witness saying, it is the very basis for discrimination.

Now what Mr. Orr obviously meant by the human dimension was the impact that less favorable plan treatment might have on individual pension claimants as opposed to financial creditors. In other words personal hardship.

But it's almost as if Mr. Orr and those who prepared him for his 30(b)(6) deposition, were oblivious or indifferent to this Court's very clear ruling, since reiterated, that individual hardship is simply not germane to the unfair discrimination analysis. Again, the rule of law.

Specifically on June 26th of this year Your Honor said, "I'm going to say here as unequivocally as I can, that as a matter of law a creditor's needs is not an issue when it comes to determining unfair discrimination".

Again on August 6th, Your Honor noted that in your view "neither fair and equitable, nor unfair discrimination has

ever in any bankruptcy case considered the impact of a plan on a creditor. That is to say the adverse impact of a plan on the creditor".

Now honestly, Your Honor, you could stop the trial right here. The debtor's decision to rely on the human dimension a legally impermissible basis for discriminating between creditors to determine treatment under the plan, is a legal nonstarter. That consideration affects the entire unfair discrimination analysis. It's enough to sink this ship. And it doesn't matter what else the debtor says.

Now obviously, Your Honor, whether the claims of retirees ought to as a policy matter be elevated above those of financial creditors in a Chapter or a Chapter 11 is a fair question. And a lot of people in this room might say yes. And in other jurisdictions, other foreign jurisdictions, that is the case.

But that's a question for elected officials whose job it is to consider public policy questions and to take legislative action. With greatest respect for this Court and every other Court, it's not for the judicial branch to make those kinds of policy choices.

Your Honor clearly recognized as much in your personal hardship rulings. And just that it's not the Court's province, it's certainly not the province of the debtor. So the human dimension as a reasonable business justification for

the discrimination must fail.

Now in another sign the debtor can't keep its discrimination story straight, the debtor did not include the human dimension in its pre-trial brief, notwithstanding it was number one on Mr. Orr's hit parade.

Instead though in that brief the debtor has suggested at the -- on the eleventh hour that personal hardship can somehow be relevant in the aggregate. And when viewed in terms of aggregate impact on the city.

Just two problems. One, there's no evidence that Mr. Orr actually considered personal hardship or the human dimension from that macro perspective. This isn't back to the future.

Mr. Orr is not Marty McFly. We can't pile into the Delorean, go back in time to before he decided to discriminate and make this the rationale. Neither the law nor the space time continuum allow for that.

Now second, there is no credible evidence that the debtor actually studied, analyzed, or quantified any alleged aggregate impact on the city. And this is the point. Alibis for discrimination are not evidence supporting discrimination. Sola fide, on faith alone where faith exists, no explanation is necessary.

Now next Mr. Orr cited a covenant with the retirees by which he meant the promise of the city to properly fund its pension systems to insure benefits would be paid. That is Mr.

Orr admits the covenant argument is just another variation on the personal hardship theme. And here he is again.

(Video Being Played at 11:45 a.m.; Concluded at 11:46 a.m.)

Now, Your Honor, perhaps the word covenant was used to lend a sacred or mystical air to this promise as opposed to all others. But as Mr. Orr, an experienced bankruptcy practitioner knows full well, bankruptcy is sadly the land of broken promises. And there will be no credible evidence to suggest that the promises that were made to financial creditors stand on lower ground than those made to retirees.

That's the whole point of the cardinal principal of rateable distribution for similarly situated creditors. Other than the breathing spell of the automatic stay and the fresh start, it's hard to conceive of a more fundamental bankruptcy imperative.

Now this is especially true that in light of the fact that contract, covenant, or holy veil, all unsecured creditors have the same expectation of repayment. And Mr. Orr admits as much in his deposition testimony.

(Video Being Played at 11:47 a.m.; Concluded at 11:48 a.m.)

So, Your Honor, the covenant argument as an objective business justification for significant discrimination fails. Now third, Mr. Orr asserted that the potential invalidity of

the COPS is a legitimate basis for discrimination.

With respect that makes no sense. There is no law and there will be no evidence to support the proposition that a debtor can discriminate against a creditor based on its subjective belief that the creditor's claim is bogus. A debtor can object to a claim and the debtor has here.

The invalidity litigation will go on for a long time and absent a settlement a final and non-appealable order will issue from some Court some day. And we have a view of the merits, but as we all talked about yesterday, the merits are irrelevant for this.

The critical point is that if the COPS are invalidated, there will be no Class 9 claim. And by definition discrimination won't be an issue. If on the other hand Class 9 claims are upheld as valid, there will be an allowed claim.

And in that allowed claim scenario it cannot possibly be justifiable to discriminate on the theory that back in the day the debtor tried but failed to invalidate the claim. There is a legal term for that sort of logic, heads, I win, tails, you lose.

So the notion that the debtor can discriminate because it has a gleam in its eye is also undermined by the plan itself. The plan provides for a B note reserve that would pay allowed Class 9 and 10 -- allowed Class 9 claims 10 cents on the dollar.

So the plan acknowledges as it must that invalidity might fail, but purports to discriminate even if it does. Not shockingly no case cited by the debtor suggests that a priority discrimination can be based on a debtor’s idiosyncratic view of future claim resolution. And so the invalidity argument as an objective business justification for significant discrimination fails.

Now last Mr. Orr said discrimination is justified because there are assets in the pension systems. But what earthly connection is there between the pension funds containing assets, and the very significant discrimination in favor of pension claims? The evidence will demonstrate no connection.

The fact that the pension funds have more or less assets merely delineates the size of the under funding claim, nothing more, nothing less. But it has nothing to do with discrimination or an objective business justification for discrimination.

So the evidence will show that all of Mr. Orr’s bases, given as a 30(b)(6) witness for the debtor’s discrimination are woefully insufficient. The evidence will show that none of these rationales singly or collectively resemble an objective reasonable business justification for what Your Honor said was very significant discrimination.

Now as Mr. Wagner will discuss a little later on, the evidence will show that the discrimination in the plan was

severely understated. And that evidence will also go directly to a lack of good faith.

But notwithstanding that, Mr. Orr's 30(b)(6) testimony is supposed to provide the only pertinent rationales for discrimination, otherwise why bother having 30(b)(6) witnesses. I want to briefly touch on a few of the enumerable other purported bases for discrimination that the debtor has tried on for size from time to time.

Now the debtor's reply uses these, employee morale, settlement of the eligibility litigation, pensions in that -- pensioners inadequate ability to protect themselves, the grand bargain proceeds are outside the plan and shouldn't be considered. And discrimination is minimal when OPEB and pension claim recoveries are viewed in the aggregate.

Now only some of these survived to make it into the debtor's pre-trial brief. But I'm taking the time to talk to the Court about these because given Mr. Orr's 30(b)(6) testimony, there is no doubt that debtors will decide it must come up with something different and better to keep the plan afloat.

And this re-invention campaign on discrimination is already in full swing. Now first the debtor has asserted that treating pension claims far better than financial creditors is reasonable because doing so will enhance the morale, performance, and retention rates of the active work force.

Two problems. First you will hear testimony from Kevin Murphy of Charles River Associates. He's a respected labor economist and he will testify that he could find no economic or empirical basis to support the debtor's contention that active worker morale, productivity, or retention would be adversely affected based on the magnitude of proposed pension cuts for -- or Class 10 and 11 recoveries.

We heard Mr. Bennett's critique of that. The evidence will stand or fall on its -- on its own weight.

Second, the debtor has no credible evidence or analysis. This is just another article of faith. Discovery has revealed no correlation whatsoever between retiree recoveries and active employee performance, morale, and retention.

Moreover, and this is a problem you will hear over and over and over again. The debtor made no meaningful attempt to establish any correlation before Mr. Orr made the decision to discriminate. Now Mr. Orr himself acknowledged that the principal driver for employee retention is an individual's go forward wages and benefits, not how pension claims are treated, no mention of those.

(Video Being Played at 11:53 a.m.; Concluded at 11:54 a.m.)

Now, Your Honor, if reductions to retiree benefits most notably pensions, was a key factor with respect to active employee morale and retention, one would reasonably have

expected the discovery and the evidence to show two things. First, one would reasonably expect a noticeable and measurable difference in active employee productivity, morale, and retention between the filing of the debtor's first plan of adjustment which proposed a 26% cut to GRS members and later filed versions which proposed only a 4 1/2% cut.

Second, one would reasonably expect that Mr. Orr and his team would have worked hand in hand with those people closest to the debtor's active work force such as the labor director and the police and fire chiefs to determine what level of pension reductions would be possible without compromising employee morale, productivity, and retention.

Additionally one would expect the debtor to engage in a systematic study and analysis of these issues. But the evidence will show none of that happened.

Now Mr. Michael Hall, the debtor's labor director, testified at his deposition that there was no perceptible uptick in employee morale and retention when the debtor's initial 26% cut was reduced to 4 1/2%. And here is that state deposition testimony.

(Video Being Played at 11:55 a.m.; Concluded at 11:56 a.m.)

Now Mr. Hall further testified that no one consulted him at any time regarding those proposed cuts about the appropriate level of pension cuts to avoid these terrible

morale, productivity, and retention issues.

(Video Being Played at 11:56 a.m.; Concluded at 11:57 a.m.)

Now that's odd. The debtor says the pension cuts have to be ever so carefully calibrated to avoid damaging the morale, productivity, and retention of the active work force. But no one bothers to keep the labor director in the loop.

Now finally Mr. Hall said at his deposition, that attrition of the active work is "not a major problem" because "there are not a lot of options here in the city". And here he is again, Your Honor.

(Video Being Played at 11:57 a.m.; Concluded at 11:58 a.m.)

Now, Your Honor, that last statement is one very unfortunately that no one in this room is likely to seriously dispute. Now the debtor knows that it has a problem on this point. It's going to put police Chief James Craig and fire Chief Edsel Jenkins on the stand to testify to the necessity of the discrimination and the potential negative impact of additional pension cuts on the active work force.

But there is still a problem. The police Chief and the fire Chief have already testified that no one from the debtor consulted them either.

(Video Being Played at 11:58 a.m.; Concluded 11:59 a.m.)

So, Your Honor, in sum the debtor will have no credible

evidence or analysis to -- in support of this alleged business justification for its very significant discrimination which again takes me back to sola fide, by faith alone, where faith exists no explanation is necessary.

And let me briefly discuss a couple of additional rationales the debtor has thrown at the wall in its briefing. For instance the debtor says an objective business justification for discrimination in favor of pension claims is the fact that the retirement systems settled their eligibility dispute.

When Mr. Orr acknowledged that preferential treatment of the pension claims was neither designed to induce, nor a requirement for settlement of the eligibility litigation. Watch for yourself.

(Video Being Played at 12:00 p.m.; 12:00 p.m.)

Okay. So again one thing had nothing to do with the other. Discrimination bait and switch. This is not what Mr. Orr thought about when he made the decision to discriminate.

But even if it did, the fact that a creditor graciously agrees to massively preferential treatment to that of pari passu creditors cannot itself be the business justification for that favorable treatment. Now what little case law there is addressing this perfect circle of an argument says what you would expect, it’s no rationale at all.

Now additionally, Your Honor, those who fought

eligibility lost before Your Honor, not by a little. Your Honor could not have been clearer that pension claims could be compromised in Chapter 9 the same as other contractual claims.

Settling that argument cannot be a springboard to enormously preferential treatment. So we can strike that rationale off the list as well.

Now the debtor also argues that an objective business justification for its very significant discrimination is that the pensioners have no real opportunity to protect themselves from mismanagement and investment of pension assets. Now even if that were true and the evidence will demonstrate it isn't, how would that be an objective business justification. How would discriminating on that basis lead to some business or economic benefit for the City of Detroit and its citizens post emergence.

The answer of course is that it wouldn't. One thing has nothing to do with the other. So this is just personal hardship in sheep's clothing.

Now in the first place let's all be clear that the retirement systems hold the pension claims in Classes 10 and 11. Payments to individual pensioners are not really what we're talking about here. And that's already been addressed in this case.

Early on Mr. Bennett was asked, who holds the pension claims and he forthrightly said, it was the retirement

systems. And he was correct about that.

But even if individual pensioners held the pension claims, the evidence, including Mr. Orr's testimony will demonstrate that the pensioners had plenty of protection. Specifically active employees are represented by unions, retirees are protected by retiree associations, and all pensioners are protected by the boards of trustees of the retirement systems.

And the evidence will show that the systems released significant financial disclosures and reporting each year for accountability sake. The evidence will also show that the retirees even have the ability to vote in some, but not all of the trustees giving them an additional lever to protect themselves.

And on top of it all, the evidence will show that the retirement systems have actually performed pretty well in terms of return on investments when compared to their peers in the market. So I have to confess this rationale for discrimination I actually don't really understand. But it also falls away. And to the extent this argument is remotely relevant, and we don't think it is, it doesn't support the very significant discrimination.

Now next the debtor argues that pension claim recoveries are substantially lower when the grand bargain proceeds are excluded from the calculation of their recoveries. And at

first the debtor states that these proceeds should be excluded because they are payments outside the plan.

Now the first problem with this argument is that the concept of payments outside the plan is an artificial one. Mr. Bennett thinks he has his case law, we have ours. We'll deal with that at closing. But Courts have explained that "since all payments must be made according to the terms of the plan, there really is no such thing. It's a fiction".

And such is the case here. But moreover the grand bargain proceeds are expressly factored into pension claim recoveries throughout the plan and the disclosure statement. And the evidence will be crystal clear that the grand bargain proceeds are directly attributable to the transfer of the DIA assets which are assets of the debtor.

The consideration for the transfer of the debtor's property, the proceeds of course become property of the debtor. Same as any 363 sale in a Chapter 11 context. Liens, claims attach to the proceeds.

If the -- if the asset was part of the -- of the debtor's estate, and I know we don't have the estate issue here, but it's still the debtor's property. The fruits of -- of those assets are by definition the debtor's property as well.

And the debtor has made multiple statements in its pre-trial brief confirming the obvious, that the grand bargain proceeds are transferred to the city. Specifically the debtor

noted, “in a dismissal scenario, the city obviously would lose access to the $816,000,000 in funds it is due to receive in connection with the grand bargain”. That’s Paragraph 81.

` “As set forth in the consolidated reply, the city will receive funds with a nominal value of approximately $816,000,000 over the course of the 20 year period following the effective date”. Paragraph 165.

Same paragraph, “the city is receiving these funds despite the significant dispute as to whether the city even possesses an interest and with DIA assets that are capable of monetization”.

Now I don’t think you heard anything from Mr. Bennett that really contradicted that. I didn’t have a final transcript of yesterday’s hearing, but I thought I heard him say the city “gets a sum of money from the foundations and the DIA Corp.”, or words to that effect.

And by the way if the city truly believes its argument that the grand bargain proceeds were not coming to the city in the first instance, it would then also have to acknowledge that it would therefore be receiving zero dollars on account of the DIA assets. That of course would be fatal, unfair, equitable, fraudulent transfer, and even 9019 grounds. If you get zero, I think you -- you haven’t satisfied the lowest range.

Indeed if this were just a transaction between a bunch of

non-debtor third parties as has now been portrayed, I'm not even sure this Court would have subject matter jurisdiction over a settlement. If the state, and the pension, and the retirees want to go off and a have deal, you give me $200,000,000, I'll give you a release, what's that got to do with the debtor? What's that got to do with this Court? But I don't think they're really saying that.

Now let's talk a bit about gifting because that's another argument that we hear the debtor make. But these proceeds are not a gift. And they're not a gift outside the plan. We all know gifting occurs when senior secured creditors voluntarily offer a portion of their recovered property under a plan to junior stakeholders.

Now the evidence will make clear that the DIA funding parties are not creditors in this case. In fact none of the grand bargain parties are receiving recoveries under the plan and by definition none of the grand bargain parties have a recovery they can transfer.

They can't come bearing gifts because they have no gifts to bear. Now the evidence will show that this excuse for discrimination is nonsensical.

Finally last, and possibly least, I want to talk just for a second about the averaging argument. Now the averaging argument is that one should not measure Classes 9 and 10 against -- 10 and 11 against 9 and 14, but again some

combination that includes the OPEB class recoveries.

Now that was the subject of a motion in limine as Your Honor knows. And not surprising the debtor agreed to not pursue this argument. The plan proponent has abandoned this argument.

So we don't think it actually should consume any trial time. But if -- if Your Honor is inclined to hear it, we will demonstrate one, there is no case support for any such proposition of averaging, it's a made up theory.

Second, the plan expressly places the pension claims and OPEB claims in different classes. And remember, the pension claims are really owned by the retirement systems as Mr. Bennett conceded. The OPEB claims are owned by the individual retirees.

And there's not that much overlap between the classes. The retirement systems again hold the pension claims and according to the debtor's own figures, there are 11,000 pensioners who do not hold OPEB claims. So if they were averaging there would be 11,000 people that would be averaging one number which is not how averaging works. I was not very good at math, but I don't think you're going to average one number.

Finally, the OPEB claims are massively overstated as the evidence will show and contrary to my esteemed colleague, Mr. Alberts, we think the evidence will demonstrate that those

claims were quite overstated and that the recoveries for OPEB are much higher in reality.

So each of what we call the never mind what Mr. Orr said rationales, fails. And it is telling that for all the rationales that debtor tossed around to justify discrimination, only a few made the final cut into the debtor's pre-trial brief.

Specifically the debtor held on to the morale argument we've talked about, the settlement of the eligibility litigation we've talked about, the inadequate protection we've talked about, and the outside the plan point. The rest are in the discard pile.

But not a single one of those arguments were cited by Mr. Orr in his 30(b)(6) testimony. And, Your Honor, this is not a game we're all playing. The debtor is not supposed to be on a never ending scavenger hunt for a reason to discriminate or tossing darts at a discrimination dart board. It was obligated to actually consider and rely on a business justification before and not after the fact.

So in sum, Your Honor, the evidence will demonstrate that the debtor cannot demonstrate an objective -- objectively reasonable business justification for its very significant discrimination and the plan therefore fails the Aztec test. Now even if the plan were otherwise pristine, and it is not, confirmation must be denied.

I'm not going to spend much time on the other Aztec elements, they're covered in our pre-trial brief. But I did want to talk briefly about whether the discrimination is necessary.

And you can answer that question by looking at the current plan itself. The current plan itself contemplates a potential cram down of the pension claims with lower recoveries of 39 and 48% to Classes 10 and 11 respectively. Because if they rejected the plan, the grand bargain proceeds would have been unavailable.

Presumably the debtor meant what it said in its pleading that it would pursue cram down on Classes 10 and 11 at those lower recoveries if they rejected the plan. If that's true, if you could do that, if you could still confirm your plan, by definition this discrimination is not necessary as I understand the term.

Additionally Mr. Orr admitted at his deposition that the first plan filed on February 2014 which proposed much lower recoveries for pension claims was feasible.

(Video Being Played at 12:11 p.m.; Concluded at 12:11 p.m.)

Now if Mr. Orr believed that the first plan which offered pension claim recoveries of 29 and 33 cents on the dollar was feasible, then ipso facto the discrimination in the current plan is not necessary and that's another body blow.

Now, Your Honor, I'm going to briefly turn to the Markell test. Now like Aztec, Markell brooks no deference to what the debtor thinks or believes but requires independent determination by the Trier of Fact. And under Markell there is a presumption of unfair discrimination if all of the following factors are present.

First a dissenting class check, Classes 9 and 14. Second, another class of the same priority, check, Classes 10 and 11. Third, a difference in the plan's treatment of the two classes that results in either material -- materially lower percentage recovery or allocation of materially greater risk, check, check.

And again Markell says materially lower percentage recovery. It doesn't say anything about extreme which is the Mr. Bennett standard.

And there is no question that the notional 10% going to the COPS is materially lower than the notional 59% going to GRS and the notional 60% going to PFRS. I'm not going to belabor what I said about the debtor's troubling and belated about face on true recoveries as opposed to the higher recoveries it soliciting on and that we used to induce yes votes in Classes 10 and 11.

Judicial estoppel is called for, we'll raise that at the appropriate time. But more to the point this Court has noted the discrimination and Mr. Orr has agreed. And Your Honor was

being your usually measured self when you referred to it as very significant discrimination.

Now according to my dog eared -- dog eared copy of Roget's Thesaurus, material and significant are recognized synonyms and it's hard to tell from the debtor's latest briefing, but I don't really think there's a serious -- let me put it another way. I don't think there's a material or significant dispute that there's material or significant discrimination in this plan.

But if even if somehow the notional discrimination was not sufficient to be viewed as material, the evidence that Mr. Wagner will touch on will show much greater discrimination.

Now additionally, Your Honor, the evidence is going to clearly show that the plan assigned significantly greater risk of recovery to COPS claims, no doubt about it. Remember all they get is a 30 year payment stream from a municipality that lamentably is rated below investment grade.

The pension claims will receive payments over 20 years from very well healed foundations and investment -- and the investment grade State of Michigan. So if you look at the LightSquared case and other cases it's obvious that there was materially more risk being assigned to the COPS aside from a much more notional recovery.

In sum the evidence will be as clear as it can be that the relative recoveries and risk allocations of pension and

COPS claims creates record breaking bone crushing presumptions of discrimination under Markell.

Now there are three ways the debtors could rebut the presumption. The debtor could show that the COPS claims and other unsecured claims can receive similarly less outside of bankruptcy than the pension claims on a percentage basis. Or the COPS claims assumed pre-petition a similarly greater risk of recovery, or the pension claims holders have infused new value, i.e. money into the reorganization that exceeds -- maybe that's overstating it. That matches or exceeds the value of its plan recovery. None of that is present here.

Now first the evidence will not permit the debtor to demonstrate that outside of bankruptcy the COPS claims would receive similarly less than the pension claims. Here we would argue less than one-tenth the debtor's notional recovery suggests one-sixth. Either way it will prove an insurmountable task.

Now the city has no credible evidence whatsoever that the COPS would fare any less well than the pension claims outside of bankruptcy, let alone suffer anything remotely to the type of first world, third world disparity in recoveries set out in the plan.

Now let's first look at the offering circulars for the COPS. Now you know -- I can represent to the Court they don't identify invalidity as a risk factor at all by the way. But

they explicitly state that the remedy available to service corporations in the event of non-payment is “the same remedy that the retirement systems would have against the city if it failed to make its annual payment required from -- required annual payment, sorry, to fund UAAL under the traditional funding mechanism”.

Of course failure to fully fund UAAL is the precise claim contained in Classes 10 and 11. There is no need to reason by analogy here. We’re not just talking apples to apples, we’re talking Granny Smith to Granny Smith. It’s the same remedy.

And that remedy of course is the ability to obtain a judgment under the LJA and to cause the city to levy taxes to satisfy the judgment irrespective of statutory caps. Same remedy, same priority. And we know the pension funds have occasionally had to go and get an RJA judgment.

Now the debtor’s reply admits as it must, that “tax bills that would ensue under the RJA would be of equal priority”. Now finally, and I’ll talk about this when we get to the best interest test, the evidence will be uncontroverted that the debtor did no analysis whatsoever of how creditors would fare outside of bankruptcy in a dismissal scenario.

So how it plans to prove a similarly skewed outcome or any outcome, retirement systems versus COPS outside of bankruptcy is beyond my admittedly limited powers of comprehension. So much for the possibility that the COPS

would receive similarly less than the pension claims outside of bankruptcy.

And again, fide sola, on faith alone, no explanation necessary. Now correlated to the first method to rebut unfair discrimination under Markell is the second. That the COPS claims assume different risks pre-petition.

Now as I mentioned before, the COPS claims recover nothing in the event they are invalid in which case discrimination is off the table. But when comparing pre-petition risk of recovery to risk of recovery under the plan, it's imperative that the Court do so under the assumption that the COPS are valid. That's how the plan is structured.

Ten cents for allowed COPS claims. And that's how the plan must be judged. And as a result it's no answer at all to wave the flag of invalidity. That would be asking the Court to assume the conclusion, to pre-judge really litigation that Your Honor has noted it is likely to turn on a number of hotly contested facts and is not a suitable case for summary disposition.

So if the debtor wins on invalidity, no discrimination. If the COPS win, no basis for discrimination. So we'll hear no evidence, no credible evidence regarding a finding of greater pre-petition risks. So we can take that one off the table as well.

Now finally the debtor can rebut the presumption of unfair discrimination by demonstrating that the favored class is contributing new value. But the evidence will show that there is no new value contribution by the retirement systems or pensioners and it's no slight against the pensioners to say so.

They are either retired and by definition not contributing new value, or active employees who are continuing to provide their labor but of course are being paid their wages and benefits for doing so. So simply put the evidence, or the lack of evidence developed or attempted to be developed by the debtor, will leave but one possible conclusion. And that just as it failed under Aztec the plan fails under Markell.

Now in the final reckoning, whatever test one employs, the record will demonstrate that the plan engages in historic levels of discrimination and cannot be confirmed.

And I wanted to turn to the best interest of creditors test. Now, Your Honor, that test which --

THE COURT: Before you do that, can I ask how long you'll be?

MR. KIESELSTEIN: I am about two-thirds through my presentation, although I've lost track of how long I've gone already.

THE COURT: Well, you've gone 90 minutes. So I'm

going to suggest that we break for lunch now and you come back.

MR. KIESELSTEIN: Sure.

THE COURT: For that, is that okay with you?

MR. KIESELSTEIN: That is more than okay with me, Your Honor.

THE COURT: Okay. So let's reconvene at 1:50, please. One second. And we'll be in recess.

THE CLERK: All rise. Court is in recess.

(Court in Recess at 12:20 p.m.; Resume at 1:50 p.m.)

THE CLERK: All rise. Court is in session. You may be seated. Recalling case number 13-53846, City of Detroit, Michigan.

THE COURT: It appears everyone is here.

MR. BENNETT: Your Honor, just a brief point. During the presentation this morning on at least one occasion answers were projected without questions.

In the break I have asked Mr. Kieselstein to agree that that won't happen again as we think it's potentially misleading. It may have been in that instance, we'll deal with it at closing. Mr. Kieselstein has told me that they don't have that problem going forward, but we would like it not to be repeated.

THE COURT: All right. I think that sounded nice. And before we continue, I need another minute. Is Ms. Neville

here or anyone from the committee? Would you step forward, sir, and Ms. Lennox is probably not here either, huh?

All right. I need someone to volunteer to stand in for her. It's not -- it's not a complex matter.

MR. ALBERTS: I will endeavor to do that.

THE COURT: I received this letter from a woman named Rita Dickerson who was one of the people who spoke on July 15th. And she raises an issue that I need for the two of you or at least Ms. Neville and Ms. Lennox to deal with. So I have a copy of this letter for each of you. Please take care of that for me.

MR. ALBERTS: Thank you, Your Honor.

MR. KIESELSTEIN: May I resume, Your Honor?

THE COURT: Hold on one second.

THE CLERK: No audio.

THE COURT: No audio. Can you hear me now?

THE CLERK: They can't hear it in the media room or the other rooms. I can hear.

THE COURT: Is someone coming to deal with the problem? So we should hold off until that happens? Okay.

While we're waiting, is it -- is it okay for us to have a copy of your PowerPoint presentation during this opening, or that you're using during this opening?

MR. KIESELSTEIN: Of course, Your Honor, absolutely.

THE COURT: All right. Is there any objection to

that?

MR. BENNETT: No objection, Your Honor.

THE COURT: All right. Do you have an extra copy for us?

MR. KIESELSTEIN: Can I just make sure I have no chicken scratch on this one?

THE COURT: Yes, although --

MR. KIESELSTEIN: Not that it's legible, but --

THE COURT: Yeah, I was going to say although we are capable of ignoring all of that. Also while we're waiting, can I suggest to you, Mr. Kieselstein that it would help me if you would slow down your presentation by about 20%.

MR. KIESELSTEIN: Sure. I took some riddling during the break, Your Honor.

THE COURT: Well, I don't -- I don't mean, you know, to do that, but it would help me if you would slow down a bit.

MR. KIESELSTEIN: I will do so, Your Honor.

THE COURT: If you need help on how to do that, Ms. Green is in the courtroom.

MR. KIESELSTEIN: Your Honor, Mr. Hackney has a cattle prod, so I'll be fine.

THE COURT: Oh, well, I won't compete with that. You're all set? All right. Let's settle down and proceed.

MR. KIESELSTEIN: Thank you, Your Honor. Again Marc Kieselstein, Kirkland and Ellis, LLP on behalf of Syncora.

Deep breath. Okay, Your Honor.

When we left off I was about to start with the best interest of creditors test. And I want to turn to that now. Now Your Honor, that test is found in Section 943(b)(7) of the Bankruptcy Code and it's simple. For each and every creditor and we'll talk about that momentarily.

The debtor must prove by a preponderance of the evidence that it is receiving as much or more under the plan as it would receive if the case were dismissed. Now we're all familiar with that test from Chapter 11 and we all know the test is normally satisfied by a liquidation analysis and a disclosure statement which demonstrates creditors were fair in a hypothetical Chapter 7.

And of course these is inevitably a degree of conjecture. Will the trustee try to operate the business for a short time or shut it down and put everything under the hammer. A dozen other assumptions. And notwithstanding the need for educated guesswork every Chapter 11 debtor of any size does the work through an expert in almost every case because they know they must to meet their burden at confirmation.

Now of course municipalities can't be liquidated. So the analysis substantively is different and yes, more challenging. But Congress didn't say it's too hard, it's too complicated, don't bother, Congress said Chapter 9 debtor you must also satisfy this test, you must also bear this burden and that's

the way it's been in municipal bankruptcies for eons.

Now to our amazement the evidence will show that the debtor for all the tens of millions of dollars it has paid its experienced advisors, simply didn't bother. The only thing the record will reflect that the debtor has done is to draft a few declarative sentences in their briefs and for their expert reports. I'm obviously not going to talk about Mr. Buckfire's report.

Now as the evidence will show, the debtor shirked its duty in a case where they are paying rejecting creditors a mere 10 cents on the dollar and as Mrs. Spence's report will show, substantially less than that. So a dismissal scenario could be pretty ugly for unsecured claims and still clear that very low bar.

Now Mr. Bennett talked yesterday about the debtor's novel idea that the best interest test under Section 943 of the Bankruptcy Code is different from the familiar best interest test in Chapter 11. Wildly so according to his opening argument.

But neither the law nor the facts line up with what -- with what Mr. Bennett argued yesterday and to some extent this morning. Now fortunately for us was a preeminent law firm that's already very recently done a comprehensive survey of this field and this question and laid out a great summary far better than I could.

So here's a brief filed by Jones, Day in the Stockton, California bankruptcy. And I'm going to read a lengthy excerpt lest anyone suggest that I'm taking it out of context.

The phrase best interest of creditors is a familiar one to bankruptcy practitioners. Broadly stated, it embodies the core requirement that a proposed plan provide a recovery to each dissenting creditor that is superior to that otherwise available to the creditor.

The basic protections for dissenting creditors has been part of statutory bankruptcy law for well over a century. The earliest bankruptcy law specifically required that both corporate plans of reorganization and municipal plans of adjustment, I'm going to skip over an internal cite or two, Judge, be in the best interest of creditors.

Now in the 1978 overhaul of the Bankruptcy Act, Congress added specificity to the best interest test applicable in Chapter 11, requiring a dissenting creditor to receive or retain property of a value as of the effective date of the plan that is not less than the amount that such holder would have so received or retained if the debtor were liquidated under Chapter 7 of this title on such date.

The legislative history explained that this provision incorporates the form of best interest of creditors test found in Chapter 11 but spells out precisely what is intended. At the same time for municipal restriction under Chapter 9,

Congress maintained the historic best interest terminology in Section 943(b)(7). The legislative history notes that the newly formulated Chapter 11 test “is phrased -- is phrased in terms of liquidation of the debtor”.

Because that is not possible in a municipal case, the test here is raised in its more traditional form using the words of art. “Best interest of creditors”.

The purpose of the best interest test, however, remained unchanged. Specifically in both Chapter 9 and Chapter 11, the test operates as the key protection for individual dissenting creditors in a reorganization case.

While the cram down protections of Section 1129(b) apply in the event that a dissenting class rejects the proposed plan, the predictions of the best interest test apply to all individual dissenting creditors, even those who claim -- whose claims are classified within a class that has accepted the plan. Again, I’m going to skip the internal case cites.

Thus, if even one dissenting member of an impaired class would get less under the plan than in a hypothetical liquidation, the fact that the class as a whole approved the plan is immaterial. Again, skipping cites.

Consequently the best interest test is one of the strongest protections individual creditors have. This Court has described it as a cornerstone of the theoretical underpinnings of Chapter 11. It stands as an individual

guarantee to each creditor or interest holder that it will receive at least as much in reorganization as it would in liquidation.

Skipping slightly ahead. As the legislative history quoted above makes clear, the same holds true in Chapter 9. Simply put, the best interest test is designed to protect individual creditors even in the face of majority support for a plan. This has been true in municipal restructurings for as long as Chapter 9 has existed.

As the Supreme Court held long ago, minorities under the various reorganization sections of the Bankruptcy Act cannot be deprived of the benefits of the statute by reason of a waiver, acquiescence, or approval of the other members of the class. The applicability of that rule to proceedings under Chapter 9 is plain. The fact that the vast majority of security holders may have approved the plan is not the test of whether the plan satisfies the statutory standard. The former is not substitute for the latter, they are independent.

All right. I'm going to skip some internal cites again, but they're other Chapter 9 municipal -- pre-Chapter 9 municipal cases to the same effect. That's all I'm going to say there, Judge. I think it speaks for itself.

THE COURT: Okay. And what case did you say this was filed in?

MR. KIESELSTEIN: This was in a Stockton, California

case.

THE COURT: All right.

MR. KIESELSTEIN: Filed I believe in 2014, or late 2013. And again I could not have said it better myself.

Now we can look at the facts here too. Here's what the debtor's own disclosure statement says. "At the confirmation hearing, the Bankruptcy Court will confirm the plan only if all of the requirements of Section 943(b) of the Bankruptcy Code are met.

Among the requirements for confirmation are that the plan is accepted by the requisite holders of impaired classes of claims, or if not so accepted, is fair and equitable and does not discriminate unfairly as to the non-accepting class.

Two, is in the best interest of each holder of a claim and each impaired class under the plan. Three is feasible, and four, complies with the applicable provisions of the Bankruptcy Code". But you get the point.

So now again the debtor is changing its tune. And it's doing so because it's realizing that its evidence is so lacking that it cannot argue the traditional test and has to try to create a new more lenient test. But the rule of law precludes that.

So with that put to bed, let's look at the actual evidence. Now again we have a slew of articles of faith. They don't have the ring of evidence because they're not, but

rather sound like pronouncements on high.

But again the debtor is presenting a plan that must be supported by evidence, not preaching a sermon to the faithful. And let's take a look a few of these best interest articles of faith.

First, dismissal of the Chapter -- the city's Chapter 9 case would be detrimental to all creditors. Well, that's sort of just a statement of the test.

Next, the city's pension obligations alone are so large they would eradicate any meaningful recoveries for other creditors outside of Chapter 9.

Next, tax bills will skyrocket in amount and complexity.

Next, the delinquency rates will become unmanageable.

And finally, there will be a great exodus from Detroit if tax rates are raised.

Now it would take someone with a booming baritone and not my nasal twang to lend these bare assertions the gravity that the -- that the debtor would like you to ascribe to them. But singly or collectively, they are not evidence and they are not analysis. And the record will show that's all the debtor has.

Now the evidence will demonstrate that a dismissal analysis requires a determination of the amount of claims that would exist if the cases were dismissed and an assessment of the debtor's ability to satisfy those claims.

Now Mr. Orr, who knows his way around the Bankruptcy

Code, rightly recognized that the best interest test requires such a comparison of creditor recoveries. Understandably of course he didn't conduct that analysis himself.

(Video Being Played at 2:11 p.m.; Concluded at 2:11 p.m.)

And that's understandable. After all Mr. Orr is a lawyer, not a financial professional. He testified that he relied on Mr. Buckfire to conduct that analysis.

(Video Being Played at 2:11 p.m.; Concluded at 2:12 p.m.)

And Mr. Orr stated that he personally reviewed Mr. Buckfire's analysis.

(Video Being Played at 2:12 p.m.; Concluded at 2:12 p.m.)

He even remembered what the document looked like.

(Video Being Played at 2:12 p.m.; Concluded at 2:12 p.m.)

Now there is only one slight problem with Mr. Orr's testimony with respect to Mr. Buckfire's impressive sounding dismissal analysis.

THE COURT: Pull the microphone over.

MR. KIESELSTEIN: Dismissal -- sounding dismissal analysis. Is that better, Your Honor?

THE COURT: Yes.

MR. KIESELSTEIN: Okay. As we now know Mr. Buckfire did no such analysis.

(Video Being Played at 2:13 p.m.; Concluded at 2:13 p.m.)

Now, Your Honor ruled yesterday that Mr. Buckfire's expert opinion won't come into evidence. But here he's just

testifying to the facts. What did the debtor and its advisors do or not do? And the facts are that the debtor didn't even try to carry its burden on best interest.

So not to put too fine a point on it, Mr. Orr did nothing. He stated he relied on a report by Mr. Buckfire that does not now nor did it ever actually exist.

Not only that Mr. Orr said he personally reviewed the analysis. But back at the ranch Mr. Buckfire was adamant time and time again he undertook no such analysis. Okay. Well, maybe Mr. Malhotra can clear things up. After all he was the debtor's 30(b)(6) witness on and I quote, "the ability of the city to pay its unsecured and/or -- and/or outstanding obligations in the ordinary course if the city's bankruptcy case were dismissed".

(Video Being Played at 2:15 p.m.; Concluded at 2:15 p.m.)

Okay. So now we have the debtor's 30(b)(6) witness on this key confirmation element, the individual with the most knowledge speaking not only on his own behalf, but on behalf of the debtor acknowledging that he and thus the debtor itself knows nothing in terms of a best interest analysis. Another binding and devastating 30(b)(6) admission.

And again, and this bears repeating, with respect to what creditors would recover if the Chapter 9 case were dismissed, Mr. Orr did nothing and relied on an analysis by Mr. Buckfire but Mr. Buckfire did nothing. And the debtor's 30(b)(6)

witness on the subject, Mr. Malhotra also did nothing.

So I'm going to go out on a limb here and say the record will demonstrate that the debtor cannot meet its burden of proof on this issue. And Mr. Bennett brilliant and able as he is, cannot do a stand up dismissal analysis from the podium as he tried to do this morning. This is emblematic of the problem with this plan. Very little work, a lot of talk.

Now, I have to say that I also didn't realize that the first day of the confirmation hearing was the eligibility hearing. We'll have something to say about that. But I don't believe you can salvage your lack of an expert done, methodically sound best interest analysis by pointing to the eligibility hearing. Basically, Your Honor, the debtor has dropped a big mess on your doorstep.

Now related to the dismissal scenario, the debtor asserts that if the cases were dismissed, the debtor would be unable to raise additional revenue to pay creditors through changes to tax policy as such attempts would be futile. Now specifically the debtor has argued that taxes cannot be raised without adversely impacting revenues, that delinquency rates will become unmanageable, and there will be a biblical exodus from the City of Detroit if tax rates go up.

Let's see what the evidence is to back all that up. Now in reaching this very important conclusion, Mr. Orr heavily relied on Mr. Buckfire's analysis of the debtor's capacity to

raise incremental revenue through tax policy.

(Video Being Played at 2:17 p.m.; Concluded at 2:18 p.m.)

And indeed Mr. Buckfire was unequivocal and to the point in his opinion that the city would be unable to generate additional revenue by raising taxes.

(Video Being Played a 2:18 p.m.; Concluded at 2:19 p.m.)

Okay. But hold the phone. It turns out that Mr. Buckfire didn't study the tax issue.

(Video Being Played at 2:19 p.m.; Concluded at 2:19 p.m.)

Okay. So maybe there is no problem after all because Mr. Buckfire says he relied, as experts can, on the careful analysis of another expert, Dr. Cline at Ernst and Young that showed increasing taxes would lead to a decline in revenue.

(Video Being Played at 2:20 p.m.; Concluded at 2:21 p.m.)

Okay. That's pretty meaty, Your Honor. But let me pick out something Mr. Buckfire said because it's important. An increase in property taxes would and I quote, "certainly lead to a decline of revenue".

Well, those are best interest fighting words. And I heard Mr. Bennett talking tax saturation issues earlier but not by reference to any evidence, just to other cases.

Now I'm not sure that advances the evidentiary ball, but if true that would be at least a meaningful data point in starting to put together a coherent and persuasive best interest analysis. It might be a start anyway.

But the evidence will reveal one small problem with Mr. Buckfire's detailed testimony in this regard. And that is Dr. Cline's testimony which goes as follows.

(Video Being Played at 2:22 p.m.; Concluded at 2:23 p.m.)

Now Dr. Cline confirmed in his live testimony just days ago that neither he nor any of his colleagues performed any such tax and revenue analysis. When queried at trial whether he was "asked to identify ways for example in which the city could increase its revenues through taxes", Dr. Cline's unequivocal answer was, "we were not asked to do that".

So let's recap. When forming the opinion that raising taxes would be futile, Mr. Orr did nothing and relied on the analysis of Mr. Buckfire of the debtor's ability to generate incremental revenue. However, Mr. Buckfire did no such analysis.

Instead Mr. Buckfire relied on Dr. Cline's tax sensitivity analysis. But when asked at his deposition and in live testimony whether such an analysis existed, Dr. Cline was categorical. Neither he nor anyone else at E & Y was asked to do, nor did he do any work whatsoever to consider the tax rate sensitivities for purposes of calculating that revenue impact.

Your Honor, it has to be said, the record will demonstrate that the best interest portion of the debtor's case is a fiasco. Now the debtor is realizing how bad things are looking for their evidentiary case on this point so it's

grasping at straws.

In other words trying to bring in, and you heard Mr. Bennett say this, lay percipient witnesses to shore up its case. Entirely after the fact. But it’s too late. The debtor’s 30(b)(6) witness on the city’s tax policy, taxing capabilities, tax revenue assumptions projections and any studies regarding the foregoing and “on the ability of the city to pay judgments ordained by its creditors pursuant to the revised Judicature Act of 1961". That witness, Mr. John Hill has already testified that none of the work to evaluate creditor recoveries under the RJA was ever done.

Now I would hazard a guess to say that any debtor case that Mr. Bennett or I have been involved in, or any of the other restructuring types in this courtroom have been involved in, with a case of any size had an expert authored dismissal analysis, be it Chapter 11 or Chapter 9. From the most obscure, and you would have thought to the City of Detroit, but not so.

Now again, Mr. Hill -- I’m sorry, but listening to yourself on Mr. Hill, sorry.

(Video Being Played at 2:25 p.m.; Concluded at 2:26 p.m.)

And Mr. Hill again as a 30(b)(6) witness also testified that the city historically charged a higher income tax, a higher income tax rate similar to higher property taxes that could be imposed if there were an RJA judgment and levy and

that has historically led to higher city revenues. Here he is again.

(Video Being Played at 2:26 p.m.; Concluded at 2:27 p.m.)

Now, Your Honor, we have asked ourselves a thousand times in recent weeks why the debtor left such a gaping hole in its confirmation case. But it doesn't really matter why. It doesn't matter whether they were afraid of the answer, thought the answer was obvious, or just forgot.

What will become clear from the evidence is a mind set bent on taking every shortcut to get to the quickest possible confirmation hearing. But sometimes shortcuts lead to dead ends. And in the case of best interest, this plan has flown over the rim of the canyon.

Now what this all means is that the debtor must throw itself on the mercy of the Court, must ask Your Honor to save it from itself. But to do that, you would have to take completely on faith that the best interest test is satisfied, even as to creditors receiving 10 cents on the dollar and as the evidence will show, significantly less than that.

Now that's an impossible position to be put in. This Court is a Trier of Fact, not a supplier of fact. Again, fide sola, by faith alone where faith exists no explanation is necessary.

Although it is beyond question that the objectors bear no burden on this point and the evidence will show the debtor

cannot meet its burden. There will in fact be substantial evidence to suggest that the COPS holders would do substantially better in a dismissal scenario than they are under the plan.

Now in the first instance, the debtor has historically allocated a portion of the GRS under funding to the DWSD.

(Video Being Played at 2:28 p.m.; Concluded at 2:29 p.m.)

Now, Your Honor, the evidence will show that the COPS proceeds were used to shore up the PFRS and GRS pension funds one of the great ironies of this case. And that of course benefitted the DWSD by reducing its pension contributions on account of its employees.

Now the evidence will further show that the city quite rightly and to its credit has historically allocated a portion of the COPS debt service to the DWSD. So that DWSD could share burdens as well as benefits.

And the debtor's disclosure statement makes clear that the DWSD contribution based purely on the ratio of city employees, the DWSD employees, and consistent with historical practice, has been approximately $170,000,000, 11 or 12% of the total. And Mr. Orr has confirmed this.

(Video Being Played at 2:30 p.m.; Concluded at 2:30 p.m.)

Now under the plan of course that all goes away because the COPS are cancelled. Now if however the cases were dismissed, the evidence will show that allocation practice

would continue. It's to the city's financial benefit after all because it would reduce on a dollar for dollar basis the amount of any annual RJA judgments that could be assessed against the city on account of COPS principal and interest.

Now notwithstanding Mr. Bennett's statements from the podium about reimbursement and -- and this or that, you'll hear no credible evidence, no economically rational reason why this practice would not continue. And again let's revisit how much money we're talking about.

The exhibits to the disclosure statement show that the DWSD again has carried almost $170,000,000 of COPS liability. If that were to continue post dismissal, and again there is no reason frankly we can think of other than spite why it wouldn't, the allocable share would be approximately 11.9% according to the debtor's own numbers.

So let's pause on that for a second. The COPS would already be receiving more than they are said to receive under the plan. Twelve cents from the DWSD, an indisputably solvent entity versus a notional 10 cents from the debtor. That the evidence will show is worth materially less than face value.

I think that's game over, Your Honor. But of course on top of that there are many other sources of recovery from the RJA process where the evidence will show OPEB and pension claims would no longer be accelerated as they were by automatic operation of the Bankruptcy Code. But would they be

done on a pay as you go, or spread over 30 years the way pension under funding is normally handled.

From that fact to the debtor's own forecast its surplus cash flows which the evidence will show are substantial even after full funding of the reinvestment and revitalization initiatives.

And by the way the debtor has repeatedly stated that in a dismissal scenario the R & R monies would not be spent. In its reply the debtor stated the demise of the city's plan would deprive city residents of the benefit of the city reinvestment initiatives for which funds are available only in conjunction with the restructuring transactions and cash infusions contemplated by the plan.

So more money would be available to pay the city's outstanding obligations in a dismissal scenario. Now is that a good scenario for the City of Detroit? No, it's not. We don't pretend that it is.

But the best interest of creditors test is focused on the best interest of creditors and on whether they would fair better in that dismissal scenario than they would under the plan. And we have a very low bar to clear in this case.

Now I heard Mr. Bennett talk about how much conjecture is involved in that, how theoretical it is, how hypothetical. Yes, a dismissal scenario is by definition hypothetical. If that were a defense to doing liquidation analyses in Chapter

11 or dismissal scenarios in Chapter 9, there wouldn't be any. But of course that's not the rule that obviously proves way too much.

So in sum, though it is manifestly not the objectors' burden, the evidence will show that the COPS would actually fare much better in a dismissal scenario than they would under the plan. And that is why Chapter 9 plans of adjustment simply don't impose these kinds of Draconian haircuts on creditors, but rather adjust debts to pay them out on a manageable time frame.

That is something the evidence will show is imminently doable here. That COPS holders have repeatedly said they are open to discussing. And that could produce a win win for everyone, actives and retirees included as opposed to this zero sum plan.

Now by its own admission that it failed to do the work, every debtor prominent or obscure must do, the evidence will demonstrate that the debtor cannot satisfy the best interest test and for that reason also the plan cannot be confirmed.

Finally, Your Honor, I want to touch on fair and equitable. No doubt to the great relief of all assembled, I will try to limit myself on this.

Mr. Perez is going to speak to the grand bargain and the art in general and how the debtor's approach to all that is inappropriate. So I'm not going to step on his tag lines.

But in the Chapter 9 context this test boils down to whether the amount proposed to be paid under the plan was “all that the creditors could reasonably expect under the circumstances”.

And I want to get one thing out of the way because Mr. Bennett spent a great deal of time talking about rights of creditors outside of bankruptcy. In -- in -- under Michigan law creditors cannot lien up municipal assets. Under Michigan law creditors cannot force the sale of municipal assets.

True and I would hazard to guess true in every city and state of the union. But you cannot conflate creditor rights outside of bankruptcy with creditor expectations inside of bankruptcy. Otherwise it would be fair and equitable to pay unsecured creditors in every Chapter 9 case a brass farthing and say they’re doing better than they would outside of Court, that’s not the test.

The test is what is the debtor doing to try to maximize creditor recoveries and minimize creditor losses. And Wilber of course is consistent with the sentiments articulated by Congress when it explained the policy underlying Chapter 9.

Congress stated that Chapter 9 was meant to “allow the municipal unit to keep operating while it adjusts or refinances creditor claims with minimum and in many cases no loss to its creditors”. And this makes perfect sense because cities unlike companies are not candidates for liquidation,

they live on in perpetuity and even if a city can't pay its debts on time, it can presumably pay most or all of them back in the fullness of time after it has the opportunity to get back on its feet. That's what a plan of adjustment is all about.

Indeed the Oxford English Dictionary defines an adjustment as a small alteration or a movement designed to achieve a desired fit, appearance, or result. Again, that makes sense too.

The question is not how much cash on the barrel head can the City of Detroit pay on the effective date of its plan. The question is, how much can it pay over the long haul while still being able to provide the basic services required of a viable American city.

Now the city says that all the COPS creditors can reasonably expect is 10 cents on the dollar in 30 year notes. But whether -- and we think it's worth more like 6. And whether it's 6 or 10, the evidence will also show that the creditors in Class 9 and 14 could reasonably expect not only greater recoveries, but much greater effort to procure those recoveries by this debtor.

Again, it's no answer to say as Mr. Bennett did that unsecured creditors have no right to lien up assets. And he's conflating rights with expectations under fair and equitable. And Mr. Bennett didn't talk about fair and equitable and to be

fair there are elements I'm not talking about. I'm sure he'll talk about it at closing. But again he did put a lot of stress on 9019, a much different standard than the fair and equitable standard.

And again, as with best interest, it's not so much that we disagree with the debtor's analysis as to what it could pay although of course we do, but the threshold issue is that once again the evidence will show that the debtor made a conscious choice not to do the work to determine what it could reasonably pay.

What the evidence will show is that the debtor cut the grand bargain, committed to fund the R & R initiatives, then pivoted to Classes 9 and 14, turned its pockets inside out and said sorry, we're tapped out.

Now the evidence will show that's not nearly good enough for a party that bears a burden of proof. So let's talk briefly about what the debtor failed to do when it comes to fair and equitable.

Now first we heard -- as we heard from Dr. Cline already and I won't repeat it at length, the debtor did not explore any potential benefits from tax policy. And as I noted when we talked about best interest, no one else from the city or E & Y, or Miller, Buckfire, or Conway, MacKenzie or anybody else as far as we can tell studied this either.

And that's inexplicable, Your Honor. What is a number

one lever that a city has to raise revenue? We all know the answer, taxes and fees.

Now it's no excuse that the debtor says that Detroit is statutorily restrained from raising certain types of taxes. First, the evidence will show this is not true for all taxes such as the wage earning tax. And there are substantial revenues that could be raised without having to march up to Lansing.

What the evidence will also show that no one at the debtor bothered to examine whether and to what extent tax rates could be raised, either voluntarily, or legislatively with the help of the state.

The evidence will show that no one at the debtor bothered to see again, what could be done to help achieve a fully consensual plan. Might that have been a successful expedition up to Lansing? We'll never know because the debtor never embarked on the effort.

Now nobody likes doing homework. And nobody likes raising taxes. And especially no one likes doing homework about raising taxes. Well, we're not dealing with a moody hormonal high schooler, we are dealing with a Chapter 9 debtor charged with the fiduciary responsibility to maximize value and minimize losses as Mr. Orr rightly acknowledged early on.

The evidence will show that the debtor failed to honor this obligation. Again, the evidence will show virtually no

work on the revenue side and just -- and just -- and so when the plan was filed, the original plan, and the sixth plan, Mr. Orr didn't know the answer in terms of what revenue options were available and what could be raised. And he doesn't know the answer today.

Just as with the dismissal analysis, the evidence will show that the debtor was unforgivably lethargic when it came to the subject of taxes. And lethargy and a duty to treat creditors fairly and equitably are incompatible.

Now I do want to talk for just a minute about the art. Again, I'm going to leave the bulk of that to Mr. Perez. But just a brief point or two.

First, and this is a le peace with the lack of any dismissal analysis and the lack of any tax policy analysis. The evidence will show that the debtor did nothing prior to the striking of the grand bargain to explore monetization options for the art.

And the evidence will show that subsequent to striking the grand bargain, the debtor has remained consistent, doing nothing to explore superior alternatives for monetization of the art. And here's what Mr. Orr had to say on that topic in his deposition.

(Video Being Played at 2:41 p.m.; Concluded at 2:42 p.m.)

Now, Your Honor, in any deal I have ever done representing a debtor we are able to strike a deal with a

particular stakeholder group. The debtor retains what we all refer to as a fiduciary out. And sort of goes to the 9019 back and forth we had earlier.

And that is the ability of a debtor whether acting as a formal fiduciary or statutorily charged with minimizing creditor losses to terminate the deal if something better comes along. The debtor has to always keep an open mind because its fiduciary obligations, or put another way, it's duty to minimize creditor losses are continuous.

Now here the evidence will show that the debtor did not reserve an out for itself in the definitive grand bargain documents when they were finally filed, none that we can find.

Further the evidence will reveal the unseemly spectacle of a debtor not only not seeking out a better deal, but refusing even to entertain the possibility of a better deal. In fact actively and repeatedly resisting when the possibility of a better deal comes along.

And to be very very clear, I don't just mean a better deal for Syncora or the COPS. I mean as good or better deal for the pension claims, the OPEB claims, for everyone. We are not making a misery loves company argument. We are not trying to drag people down to 10 cents.

We're saying that the art, as well as enlightened tax policies, as well as a number of other creative options the debtor consciously ignored could light the way to a win win

for all creditors. But the evidence will show that the debtor's approach to minimizing creditor losses was like the proverbial three monkeys. See no alternatives, hear no alternatives, speak no alternatives.

Just the other day Mr. Orr's spokesman, Mr. Nowling in response to yet another alternative that had the potential to increase recoveries through the art said the following. "I am sure there are many suggestions on how the DIA collection can be monetized, but outside of the grand bargain such discussions are academic". Academic? That may be one of the least creditor friendly statements I've ever heard.

Now I'm not going to get into the question of how much additional value is realizable from the art. Mr. Perez will speak to that.

But I did want to touch for a minute on the alleged legal impediments to realizing greater value. First is the Attorney General opinion that the art collection is held in an implied charitable trust.

And as Your Honor noted, the Attorney General opinion is entitled to no special weight. It's just one man's opinion. Now we believe the opinion is plain wrong as a matter of Michigan trust law and as a matter of bankruptcy law. And so does Mr. Orr, by the way.

(Video Being Played at 2:45 p.m.; Concluded at 2:46 p.m.)

Now, Your Honor, the larger and one would have thought

obvious point is that there are billions of dollars of value potentially riding on whether the Attorney General and the DIA are right as they contend, or wrong as we and Mr. Orr believe.

The debtor says it would take a few million dollars and perhaps years to litigate. But after $100,000,000 plus of professional fees it's -- it's hard for us to understand this is where the debtor chooses to economize, it's single largest asset.

And the evidence will show that it economized by essentially accepting the AG's position at face value and taking what by all accounts is a deeply discounted price for the art.

Now the emergency manager was appointed almost 18 months ago. The evidence will show the importance of the museum assets was not lost on Mr. Orr. Remember, he spoke to the art collection almost as soon as he was appointed.

And just last week Mr. Cullen noted the art had been in the case from the very start. So that multi-year litigation the debtor says must assiduously be avoided, we could have been over a year into that litigation by now had the debtor demonstrated the least bit of initiative with respect to its largest asset.

Now the evidence will show that if the implied trust argument was challenged and defeated, the value of the art collection would be by all accounts multiple billions of

dollars. If one were to be conservative and just say an extra billion dollars were at stake and one believed as we just heard Mr. Orr does, that the debtor would have the better of the legal argument then obviously it would be economically rational to invest and invest heavily in that litigation.

Now do creditors getting a notional 10 cents on the dollar have a reasonable expectation that Mr. Orr, who has acknowledged it is in the debtor’s duty to maximize value, would try as hard as he could to unlock that value, or at least try at all. Of course they do.

But the evidence will show that Mr. Orr and the debtor made a deliberate decision to do absolutely nothing to analyze or challenge the AG’s opinion. Here again is Mr. Orr.

(Video Being Played at 2:48 p.m.; Concluded at 2:48 p.m.)

And the evidence will also be uncontroverted that the debtor did virtually nothing to assist bona fide third parties identified by FGIC and others who had a genuine interest in the collection. Now, Your Honor, you may recall several months ago, I stood on this spot and predicted that some day the debtor would say that the indications of interest that it tenatiously and successfully blocked from going forward, would never have amounted to anything anyway and thus should be dismissed out of hand. Cue Mr. Buckfire.

(Video Being Played at 2:49 p.m.; Concluded at 2:50 p.m.)

Your Honor, there is a bankruptcy term for such a

cavalier approach by a Chapter 9 debtor to minimizing creditor losses. The term is chutzpah. Now the debtor says well, what about all of these donor restrictions. They prevent us from selling the art to anyone not connected with the DIA.

To which we say yet again, where is the evidence. And the answer is, and you are no doubt sensing a trend here, there won't be any credible evidence of widespread restrictions. And there is no evidence because once again the debtor has chosen -- chosen not to do the work to determine whether there are significant restrictions or not.

But we think what evidence there is, will strongly suggest such restrictions are minimal. The DIA's own policies reenforce this conclusion. The evidence will show that since at least 1941 and earlier, continuing through the present day, it has been the DIA's policy that all gifts and bequests be without restriction.

Now you can see right here the DIA's current collection management policy says and I quote, "the acceptance of all gifts and bequests shall be without restriction. While it is the museum's intention to accession for long term use and preservation, no guarantee shall be made that the gift or bequests will be retained by the museum in perpetuity. There shall be no exceptions to this policy unless any such restrictions or special provisions are recommended by the collection committee and approved by the DIA Corp. board of

directors.

Again, the evidence will show this has been the DIA's policy for generations. If acknowledgments that we found dating back to 1926 confirm the longstanding nature of this policy.

For example, gifts shall be received in fee simple and without restriction. And they shall be used in such manner and placed and such disposition of them shall be made as the art commission may deemed advisable".

Now perhaps that is why the evidence will show that while the debtor has conjured up this specter of widespread donor restrictions at every opportunity, it has made a conscious choice not to do the work to even try to get to the bottom of it.

And the evidence will show what little information the debtor has gotten on this topic has been fed to it by the DIA. And to no one's surprise, the DIA says the collection is chock full of restricted pieces. And the DIA is not a fiduciary to creditors, the debtor is.

Now I heard Mr. Bennett talk about expectations of donors. And I heard a little bit more of that this morning from the DIA's counsel. Obviously many long since departed and the obvious implicit assumption there is that those expectations take precedence over the expectation of creditors under the fair and equitable test.

We don’t believe that that’s the law. We don’t believe that in the rough and tumble of bankruptcy, that’s the order of priority of expectations.

Yet even the DIA in its pre-trial brief admits that it, “has not engaged in meaningful discovery from the city or others” regarding restrictions on the DIA assets. And it merely speculates that “discovery will further undercut any claim the city has the right to sell or monetize the museum art collection”.

So again the DIA acknowledges that the debtor has done no meaningful discovery on this issue, although we and FGIC did and that evidence will demonstrate again that the donor restriction issue is mostly urban legend.

And I’m not sure what it means when we are starting a trial today when the DIA says discovery will undercut. Where is the evidence now? The debtor bears the fair and equitable burden now, not later.

So in sum the DIA has provided no credible evidence that the debtor cannot sell the art, merely stating its belief that discovery would uncover such evidence. Again, the debtor has not done the work and is relying on the DIA to support a position when they should be natural adversaries candidly in a bankruptcy situation, in a situation of scarce resources.

From an evidentiary and burden perspective that doesn’t cut it. And I’ll say for the last time, fide sola, on faith

alone. Where faith exists no explanation is necessary.

So, Your Honor, when we look at fair and equitable, we see failure on all fronts. Failure to explore tax policy, failure to look at the art implied trust argument, failure to look at the donor issues.

What we see is ring fencing of the art and funneling of all the proceeds to the pension claims. There is nothing remotely fair and equitable about that.

Just two more points. First, we have often heard the debtor can't be forced to sell the art. And Mr. Bennett trotted that red herring out again in his opening. That's absolutely true and we've never disputed it.

But the fair and equitable test has absolutely nothing to do with what a debtor can be dragged to kicking and screaming. It has everything to do with what a creditor can reasonably expect a debtor to do on its own, proactively to minimize creditor losses as Chapter 9 commands.

Second there is the question of why it's so important to the debtor to avoid monetizing the art. And instead to put it irrevocably beyond the reach of future administrations. Is it about economics, or is it about something completely different. Call it civic pride which we don't minimize but has to yield to other things in the context of a Chapter 9 bankruptcy.

And Mr. Bennett talked about the alleged value of keeping

the collection in Detroit. And I'll note that nothing was said about the value of the city of having to keep the collection completely intact. And what we heard from the DIA was an all or nothing argument. You're either closing the museum, or you're leaving everything untouched in this new trust as if there was no in between. Again, a failure of creativity, imagination, and energy by the debtor.

Now we asked Mr. Orr if there had been any studies commissioned or any analyses done regarding the DIA that he had relied on, i.e. its economic value to the city. And he said he reviewed an economic analysis of the DIA.

(Video Being Played at 2:56 p.m.; Concluded at 2:57 p.m.)

Now however after requesting a copy of the analysis to which Mr. Orr alluded, debtor's counsel informed us that no such analysis exists. Mr. Shumaker from Jones, Day stated, "we have checked into this with Kevyn as well. He cannot recall a specific document or study and believes he may have been recalling a newspaper article he read".

A newspaper article. Again, in our view that sums up nicely what the evidence will show was the debtor's approach to this plan and this case.

So to wind this up, the evidence will show an extreme inattention to the obligation of minimizing creditor losses as Chapter 9 requires, and a failure to meet reasonable even minimal creditor expectations. The result a plan that is

neither fair nor equitable.

Now, Your Honor, I invoked one theological doctrine at the outset of my remarks, I'm going to close with another. And that is predestination.

The idea that from the outset some are saved and some are damned. And who falls into which category is ordained by a higher power. But if you fall into the latter category your fate is sealed and no human force can change that. The die is cast.

And you can probably guess what category we think we landed in. It's not the one with the pearly gates. But thankfully, Your Honor, we live in a country with the greatest legal system the world has ever known. And the rule of law means nothing is preordained and nothing is predestined. Everything rises and falls with the strength of the evidence.

And we are confident that when Your Honor hears all the evidence you will agree with us that the debtor's plan of adjustment cannot be confirmed. Thank you for listening.

THE COURT: I have a question for you, sir.

MR. KIESELSTEIN: Yes.

THE COURT: What is Syncora's position on the percentage of its claim that the city's plan should offer to it in order for the plan to be confirmable under Chapter 9?

MR. KIESELSTEIN: Your Honor, with all due respect --

THE COURT: I need a percentage.

MR. KIESELSTEIN: Well, something that's within shouting distance of what the actives and retirees are getting, Your Honor.

THE COURT: What's the percentage?

MR. KIESELSTEIN: I'd have to consult with my client. I'm not -- I don't have authority to answer that question, Your Honor. I'd be happy to come back and answer it.

THE COURT: I want a percentage and I want it now. Because you've talked for two hours now about how insufficient this plan is.

MR. KIESELSTEIN: Uh-huh.

THE COURT: And you've made some very powerful arguments. Surely in the course of your preparation for this you must have thought about what's the percentage that will meet the Bankruptcy Code.

MR. KIESELSTEIN: Your Honor --

THE COURT: What is it?

MR. KIESELSTEIN: I'm going to be violating your mediation order. There are mediation --

THE COURT: I don't want to violate the media order -- mediation order. I want you to just give me a number.

MR. KIESELSTEIN: Seventy-five cents, Your Honor.

THE COURT: All right. Thank you. Where would the

city get 75 cents on the dollar to pay your client?

MR. KIESELSTEIN: Through a combination of all the initiatives I talked about. Back ended securities, its share in the -- in the revitalization of the city, upside sharing. It's very commonly employed in Chapter 9 plans.

THE COURT: Uh-huh.

MR. KIESELSTEIN: The debtor took it off the table here.

THE COURT: Okay.

MR. KIESELSTEIN: We think that there are --

THE COURT: I'm not asking you about mediation. I'm just asking you to list where the city would get 75 cents on the dollar.

MR. KIESELSTEIN: Okay. So that could be one space. And remember are you talking about the COPS, or are you talking about Syncora. I know Mr. Perez, you know, wouldn't be interested in --

THE COURT: You represent Syncora.

MR. KIESELSTEIN: I represent Syncora.

THE COURT: I'm asking you where you think the city should get 75 cents to pay your client.

MR. KIESELSTEIN: Your Honor, there is the art we just talked about that at great length.

THE COURT: Uh-huh.

MR. KIESELSTEIN: And we think an exploration of the

many alternatives that have been out there would -- you could sell one or two pieces. You could finance a few pieces and you would get us to that number very easily. There would still be 59,997 pieces.

THE COURT: Of course if you finance you've got to pay it back. So --

MR. KIESELSTEIN: If you can't service the debt, that's right.

THE COURT: Well, by serving -- servicing the debt you got -- that means paying the debt back.

MR. KIESELSTEIN: Of course, yes.

THE COURT: So why sell art and why not just pay you that money that they would use to pay the debt back?

MR. KIESELSTEIN: Okay. We'll take it either way, Judge.

THE COURT: So it's got to come from income either way, right?

MR. KIESELSTEIN: It has to be -- it has to come from --

THE COURT: From -- from revenues, right.

MR. KIESELSTEIN: From revenues.

THE COURT: Cities don't have income, they have revenue.

MR. KIESELSTEIN: From revenues or from asset sales. And again revenues can be in the long haul. I feel like we're

having a negotiation, Judge, but -- but that's --

THE COURT: But the only negotiation here is you are resisting answering my questions and I'm trying to cajole you into doing it.

MR. KIESELSTEIN: Well, you know, as Your Honor know there have been mediation orders.

THE COURT: And I'm not asking you to violate any mediation orders.

MR. KIESELSTEIN: Okay.

THE COURT: I just want an answer to my question. Where is the city going to get the money to pay you 75 cents?

MR. KIESELSTEIN: So we think there is --

THE COURT: You've told me sale of art.

MR. KIESELSTEIN: We think the R --

THE COURT: You told me revenue.

MR. KIESELSTEIN: We think the R & R initiatives. And we think Mayor Duggan --

THE COURT: Oh, and you told me the --

MR. KIESELSTEIN: I'm sorry.

THE COURT: What you call the back end. What was the phrase?

MR. KIESELSTEIN: Excess sharing. No, I'm sorry.

THE COURT: Excess sharing, yes, okay.

MR. KIESELSTEIN: Profit sharing. It's very easy to stretch your securities that say if the City of Detroit has a

DSCR of not greater than X, then it will pay Y.

THE COURT: A D what?

MR. KIESELSTEIN: Debt service coverage ratio.

THE COURT: All right.

MR. KIESELSTEIN: As measured by impartial third parties or rating agencies and such. There are a million ways to get from the number we're at to the number --

THE COURT: Okay. You've given me four out of a million.

MR. KIESELSTEIN: Well, I'm not -- I'm -- I could -- I could trot Mr. --

THE COURT: And I don't mean to minimize them because those are interesting things. But it's not a million, okay.

MR. KIESELSTEIN: Well, Your Honor, I'll give you another while we're here. Our view on the true value of the pension claims here and the true rate of return, I don't want to step on Mr. Wagner's line, the debtor has put in a 6.75 discount rate and a target rate of return which is less than how well they've done over the last 10 and 25 years by and large.

We haven't seen any reallocation of the assets. So in other words they have a low forecast but they have the same successful allocation.

THE COURT: Uh-huh.

MR. KIESELSTEIN: I don't know how that works. But in any event that's the case. We think there's going to be barring another market meltdown and we -- none of us know whether that's going to happen. But there is going to be lots of money going into the pension funds and pouring out of the pension funds into the segregated accounts that are set up for restoration of the pension cuts.

Okay. Ten years from now the debtor has committed to paying hundreds of millions of dollars on account of the -- of the restoration. We think in any fair reading the restoration will have occurred by then. And we hope it does, okay.

And if that's so, then you're just sort of -- Class 10 and 11 they're cup will runneth over. And so what you could do is you could say if in fact restoration has occurred, in 2023 instead of pouring even more money into the pensions, look around, see if there's anybody you haven't paid, right. And see if -- if you can augment their recovery.

THE COURT: By that you mean you?

MR. KIESELSTEIN: Yes, absolutely.

THE COURT: Your client, okay.

MR. KIESELSTEIN: That would be -- that would be me, yes, Your Honor, my client. So Your Honor again, you know we have a financial advisor. He's ten times smarter than I am.

THE COURT: All right. You've answered my questions. Thank you.

MR. KIESELSTEIN: Okay. That's -- anything else, Your Honor?

THE COURT: All right. Is it okay if we take a recess before we jump into yours? Okay. It's -- it's 3:05 and we'll resume at 3:20, please.

THE CLERK: All rise. Court is in recess.

(Court in Recess at 3:04 p.m.; Resume at 3:20 p.m.)

THE CLERK: All rise. Court is back in session. You may be seated.

MR. PEREZ: Good afternoon, Your Honor. Alfredo Perez on behalf of FGIC.

Your Honor, as Mr. --

THE COURT: Thank you for providing this PowerPoint set for us.

MR. PEREZ: Thank you, Your Honor. And, Your Honor, there are -- I have three slides toward the end where and some of them I don't have the answer and the question, so I'm going to skip over those slides in -- because of the agreement with Mr. Bennett.

THE COURT: Okay.

MR. PEREZ: But I think most of them are actually played already by Mr. Kieselstein. And I anticipated that it would be 20 to 25 minutes, but I think it's going to be a little bit shorter just because he covered some of the things that -- that I had anticipated covering.

THE COURT: Okay.

MR. PEREZ: But I'm going to talk about the 9019 status. And while Mr. Kieselstein focused on what the city didn't do, I'm going to focus on what they would have found had they actually done the work to evaluate a settlement under -- under Rule 9019.

Your Honor, as the Court is aware, the -- the DIA settlement centers around the sale of the art into a perpetual trust that the city will own forever. And I think I have the better slides, but -- so we've got the State of Michigan contribution a hundred and ninety-five, the DIA contribution 100,000,000 over 20 years. The foundations three sixty-six over 20 years goes into the charitable trust and of course everything goes out to the retirement system.

So the first thing, Your Honor, is what's the real value of -- of this settlement. And, Your Honor, I don't think it's anywhere near the $816,000,000 highlight number that we have.

Our expert will show that if you use the same discount rates, the same option that they have, that it's about 455,000,000. In other words, $361,000,000 less than what's advertising. So they're getting four hundred and fifty-five.

That's if you assume that you include the state contribution. If you take out the state contribution they're only getting 260,000,000 for the art.

Second, Your Honor, despite Mr. O'Reilly's protestations

notwithstanding, I think we're going to -- I think the evidence is going to demonstrate that there are virtually no merit to the potential litigation that has been threatened. I mean what there is, is a threat. There really isn't any evidence that there are any of these impediments that people are talking about.

And finally, Your Honor, the only evidence that I have seen as to what the value of keeping the art in the city is the work that Mr. Spencer has done. The city will provide no evidence as to what the value is other than anecdotal evidence which is no evidence at all in this case.

So first let me talk about the 9019 standards. Obviously, Your Honor, you're well aware of the requirements under the 6th Circuit. You have to appraise yourself of the underlying facts, the independent -- and make an independent judgment as to the fairness and reasonableness of the settlement.

The Bard test, the four factors under the Bard test. What I'm going to do, Your Honor, I'm going to go through each one of these factors and show what the evidence will show with respect to each one of these factors.

So first is the probability of success of the litigation. So the issues that the city purports to settle include the arguments raised by the Attorney General, as well as the arguments raised by the DIA Corp. in its various filings.

And they basically fall into two categories, Your Honor. One, that the entire collection is -- is protected by some trust. Doctrine, either equitable trust, remaining trust, whatever you want to call it. And unfortunately, Your Honor, we did have to burden you with a very lengthy brief to deal with all of these things. But I think we tried to deal with each one of their arguments methodically based on their own records which I think completely dispute -- dispute any of this knowledge.

Or second, Your Honor, that there are individual pieces that are subject to donor restrictions and as a result preclude monetizations. And as Mr. Kieselstein stated, the city basically just accepted these allegations at face value. They failed to independently investigate any of the legal merits of these claims. They failed to independently analyze the factual issues. They didn't look at the documents. For them it was like Indiana Jones.

And Mr. -- Mr. Bennett pretty much admitted that on his opening statement. But we went in and we did the work. And actually the work that they could have just piggybacked on what we did, yet they didn't do it.

So let me step back. What would they have found had they actually done the work which we did.

First, Your Honor, they would have found that the DIA has -- that -- that the city has title to the DIA collection. And

let me just -- and -- and we highlighted all -- all will be exhibits in evidence, mostly from their either depositions or their documents.

Let me just highlight three of them. One is the city charter in 1918. The powers and duties of the art commission shall be as follows, acquire, collect, own and exhibit in the name of the city works of art, books and other objects such as are normally -- are usually incorporated in museums of art.

Let me also look at the operating agreement dated December 12, 1997. This -- and this is the operating agreement signed by the DIA. The city shall retain title to and ownership of A, the city art collection, B, the DIA properties, including the fixtures.

And more importantly this is the financial statement at the bottom. The DIA's financial statement. And what does it say? The city continues to own the museum art permanent collection including the works acquired prior to and subsequent to the operating agreement as well as the museum -- as well as the museum building and grounds, title to the art objects purchased or donated by the DIA are offered to the city's art department. Title is transferred when accession to the permanent collection has been approved by the board and the arts commission of the city.

This is powerful evidence. They can't get around it. This is their own document, Your Honor.

THE COURT: And those EX numbers are your exhibit numbers?

MR. PEREZ: Exactly, Your Honor. So had they actually done the work that we did, they would have found that the DIA was established -- excuse me.

THE COURT: Yes.

MR. PEREZ: I was trying to get as exeberant as Mr. Kieselstein, it didn’t work. The -- they would have found that the DIA was established in 1918 when the city established the new arts commission which was tasked with creating a museum and that in 1919 it purchased the DMA collection and we don’t have to take it on faith.

We’ve got those documents. You can see those documents exactly what happened. How it was sold.

Second, they would have learned that at that time that the -- that the Attorney General thinks there was a charitable trust under Michigan law. There weren’t any such things as charitable trust.

So once you get away from the whole idea that this -- the whole collection is somehow in trust, they would have gone to -- well, let’s look at the individual items. Are they in fact burdened by -- by restrictions?

And again, Your Honor, they would have -- if they -- if they had done the work, the city had done the work, they would have easily found out that it was a policy of the -- of the

DIA and the city not to accept items that were burdened by any -- any sort of restrictions.

So when you look at the -- when you look at the collections management policy, it says, you know, all gifts and bequests shall be without restriction. There is no guarantee shall be made that the gift or request will be retained by the museum in perpetuity. That's what they were told.

The -- and -- and they actually did that. So -- so throughout its life the arts commission has routinely rejected gifts that had strings attached. There may be some that have strings attached, but they routinely rejected them that have strings attached.

So when you look at let's just take the last one. Mr. Booth who was referred to before. At a meeting of the art -- in 1952, January 14, 1952, at a meeting of the arts -- of the arts commission was held. The trustees decline the Booth bequest because of the limitations contained in -- in the bequest which would prevent the museum from ever taking clear -- clear title to the gifts.

So on and on the arts commission which was the city entity that actually approved accessioning works to the DIA, to the museum, rejected gifts because it had strings attached.

And finally, Your Honor, and Mr. O'Reilly referred to it, to the extent that the city did find some gifts that had

strings attached for the most part, in fact I think we only found one that wasn't. But for the most part, and we found very few by the way, they were all basically contractual obligations that were either satisfied before they were accessioned, or even if they continue, they can -- they can be easily dealt with in a -- in a Chapter 7 -- in a Chapter 9 context.

So had they undertaken the work they would have found that the evidence that was detailed in our DIA brief that clearly shows that the city on the first prong has a very high likelihood of success in any litigation over the art.

Second, Your Honor, the second factor -- oh, I forgot the -- here is the deed of gift which Mr. Kieselstein also put up which -- and this is the form that's been used forever. It says we here assign all my right, title, and interest and the acknowledgment, gifts that shall be received in fee simple without any restrictions and shall be used in a matter in a place and such disposition of them shall be made by the arts commission -- commission as deemed advisable. Clearly people are on notice. This is the acknowledgment of the gift.

So, Your Honor, let's go to the -- the second factor. Your Honor, this factor involves any difficulties in collecting the amounts owed after a successful litigation. We simply don't think there -- that this factor is at all relevant here.

The DIA Corp. argues that somehow the city will have difficulty realizing value for the DIA collection because of the so-called market constraints in Mr. Plummer's report. Obviously we disagree with that. We think the evidence will show that those are not valid. In addition they're subject to a Daubert motion.

And furthermore, Your Honor, we demonstrated in this case through one of the motions that we filed, that there is significant interest in -- in -- in the art. So I don't think if it's applicable, I don't think it's relevant. And again, it weighs in our favor.

So then we go to the third topic. And -- and this is the topic that I think is -- is the biggest red herring, Your Honor. Simply because it's just not true.

And that is what is the complexity of the purported litigation and what would be the expense, inconvenience, and delay. So the city didn't conduct any factual analysis so they really can't tell you what it is. But they nevertheless even yesterday came up with a lot of very very colorful adverbs for what -- for what they think it would take.

So I think this is probably from one of the -- one of the hearings. It's probably a waste of time and money to look at all of this. It turns out to be a nightmare. It's kind of like a file room at the end of one of the Indiana Jones movies.

It's like there's pages and pages and pages, they're terribly well organized. And in their -- in their filing there are fish in their -- in their filing. They actually went through and said, complicated, time consuming, expensive.

But, Your Honor, that's just simply not -- not the case. And the Court can't merely accept the city's assumptions and unsupported assertions and they certainly can't accept the DIA's threats of litigation that were made this morning.

It must make an educated estimate of the complexity of the litigation involved, the -- the expense, the inconvenience and here's what the evidence will show. The collections management policy pursuant to which the DIA is governed, requires that the DIA maintain accurate and up to date records, requires that the collection be comprehensively inventoried.

Your Honor, what we found was that the DIA was extremely professional. That there was a file on -- more than one file on every -- on every piece of object of art in -- in there. That these were extremely well maintained.

And so, Your Honor, you know, we sent three people to the DIA for three days. We looked at the documents, tagged the documents, and were able to make these -- these sorts of assumptions that probably would have taken the city less time than -- than -- than all of the steps that we had to take in order to do that.

And that's what they would have found. So in a very short time period and modest cost, we were able to analyze the documents and just simply determine that -- that what everybody says is the case, is just simply not the case.

So -- and in many cases, Your Honor, you don't even have to get to the factual issues. These things can be decided as a matter of law based on the documents. The documents are all there. Yes, some of them are old, but the documents are all there.

So, Your Honor, again on the degree -- on the third factor, the degree of complexity, the expense, the delay, you know, it's nowhere near what the city says and this factor again weighs heavily against -- against the city.

So get to the fourth factor. Is the proposed settlement in the paramount interest of creditors giving deference to the reasonable views of those creditors that would be adversely impacted with the settlement.

And there, Your Honor, Mr. Bennett I think re-wrote the law, certainly re-wrote the law as I knew it. And that's not the only place he re-wrote the law, but that's one of the places he re-wrote the law.

But I think while it's tempting to look at this factor as a popularity contest and determine whether there's support for the DIA settlement by counting heads, the Court must assess this prong by considering whether the settlement is in the

best interest of those creditors who are adversely impacted by the settlement here primarily the Class 9 creditors.

And all I have to do I think is read TMT -- TMT Trailer. I mean there it says, the argument that compromise is proposed with the plan of reorganization were properly approved because no creditor objected to them seems dubious ... because a plan of reorganization which is unfair to some persons may not be approved by the Court even though the vast majority of creditors approved it.

So I don't think you count heads. You look at who is affected. So if we put aside just who's getting the money because that's -- that's really unfair discrimination. It's not -- it doesn't -- in my mind it doesn't go entirely to the 9019 standard.

Are the paramount interest of the creditors affected. And -- and I would say that we are the creditors. So we've got a situation where you have the DIA assets, they're going for four fifty-five. Maybe really two ten. And then you've got valuations, at least from our expert who thinks it's worth $8,000,000,000. So what happens? Maybe nothing.

It just completely tips the scales. And you don't even have to take that. I mean --

THE COURT: Okay. So how do you deal with Mr. Bennett's argument that your client doesn't have any interest in the art?

MR. PEREZ: I don't have to have an interest in the art, Your Honor. I have an interest in the debtor following the dictates of 1129 and -- and -- and the best interest test. And that requires that the debtors do the best they can.

So if they don't -- if -- if they decide they don't want to sell the art, they -- they probably would have to find some other way of doing it. I don't have to have an interest in the art in order to be able to make this objection. That -- that is a requirement never seen before, never will be seen again.

THE COURT: Is there -- is there any case law that says that a creditor has a reasonable expectation that a debtor in Chapter 9 will monetize, whatever that means, an -- an asset which that creditor cannot seek the monetization of outside of bankruptcy.

MR. PEREZ: Well, Your Honor, it -- by definition, if you're an unsecured creditor in any municipality you're in the same position by definition.

THE COURT: Well, I'm -- I'm looking for a case. Have you got a case for me?

MR. PEREZ: Okay. Well, Your Honor, the only -- the only case that I would cite you to is -- is Judge Cline's ruling in Stockton. And that probably comes the closest to saying that, you know, basically, you know you can -- you don't even have to get approval for your 9019 statement.

I -- I don't have authority. You have it here because they've come to you. I don't have authority. But -- but he basically says, when you come -- when you come in for plan confirmation, that's the witching hour.

And if your 9019 didn't meet the requirements then there's no plan. So -- so to that extent --

THE COURT: Well, is -- is that a case in which a settlement or plan confirmation was denied on these grounds?

MR. PEREZ: My understanding the status of that is that in that case the debtor did not seek approval of the 9019 settlement. The Court reluctantly said, I don't have jurisdiction, but basically said, you know, if I find that this was untoward for whatever reason, then I'm not granting.

And my understanding is, is that -- and Mr. Bennett would know more because they're much more intimately involved than I am. We read his pleading today.

But I think that that case has been -- the confirmation hearing in that case has been continued to October 3rd. That's what -- that's what I learned today.

THE COURT: So that's the only case in response to my question?

MR. PEREZ: Well, Your Honor, it's the only case that I -- that I found between -- that I found --

THE COURT: Okay.

MR. PEREZ: -- today. But -- but -- but again I

don't -- I mean I've never heard and I think it was just like made up yesterday that you have to have an interest in the asset before you can say that -- that it's -- that there is not an obligation.

I mean there's many cases which say you have to do as much as you can. The Fano case says that. There is many cases that talk. Most Chapter 9 cases involve the taxing power because that's generally all they have.

There has been a couple -- there is the one case where they -- they denied confirmation and -- and denied eligibility. I forget if it was eligibility or confirmation because basically they had the gold plated sewer system and they weren't doing anything about that.

But most Chapter 9 cases do not have assets that would be monetized. So I think it was made up yesterday so I don't know that I have a case for it today. So --

THE COURT: So why should the Bankruptcy Code be construed to give creditors more rights than they would have outside of bankruptcy? Normally --

MR. PEREZ: But I --

THE COURT: Normally it's the other way around.

MR. PEREZ: I disagree with that. We would have -- we would have -- we would have more rights inside of -- outside of bankruptcy than we do here because we would have access to the revised Judicature Act. We would have the

ability to --

THE COURT: Okay. But -- but separating that, I thought I heard you agree that you don't have the right to --

MR. PEREZ: To compel the sale.

THE COURT: -- compel the sale, or even the monetization of the art. If you don't have that outside of bankruptcy, why should the Bankruptcy Code be construed to give you that right?

MR. PEREZ: Because Your Honor --

THE COURT: Because normally bankruptcy contracts.

MR. PEREZ: Absolutely not, Your Honor. They're getting the -- they're getting the automatic stay. They're getting a discharge. They're getting a -- you know, a breathing spell.

In return for that, what the creditors get is the obligation for the debtor to do the best that it can to satisfy the claims. That's what we're getting. That's the only thing we're getting.

And if you take assets off the table, what if it were, you know, securities worth $8,000,000,000? What if it were cash worth $8,000,000,000? Do we take those off the table too because we couldn't compel it otherwise?

We couldn't compel. If they had $8,000,000,000 sitting in their bank account --

THE COURT: Why is -- why is the automatic stay

worth $8,000,000,000?

MR. PEREZ: Well, I don't know if it is or not. I mean they obviously -- it's worth something, okay. And -- and the discharge is worth something, okay. It may not be worth 8,000,000,000.

And -- and let's -- let's -- let's be practical, Your Honor. I mean I think what Mr. Kieselstein said, it's not an all or nothing situation. And I'm going to get to what some of the indications of interest are. But it's not an all or nothing situation.

We're talking about marginal dollars here. Dollars at the margin. I mean right now we stand to get $90,000,000, both of us together forever under this plan. Ninety million dollars.

There's $130,000,000 already been spent on -- on fees in this case. Forty million dollars more. And we're getting $90,000,000.

So, Your Honor, let me go on before I digress.

THE COURT: Let you go on before I ask you some more questions?

MR. PEREZ: So, Your Honor, our expert, the Winston Group 582 objects worth 1,700,000,000. And even the city's own expert is going to say multiple -- multiples of the -- of the four fifty-five or the two sixty-six depending on -- on how you can do it.

And -- and the -- and the alleged restrictions just simply do not in any way justify the steep discount. And then we've also heard a lot about you know, what's the intangible value of keeping the art in the city.

And from what I've seen there's only been one analysis of that. That was done by Mr. Spencer. No one else did any analysis and that analysis showed that the value is very low. Again, you'll -- you'll see that.

You know, someone coming in and saying --

THE COURT: By value there you mean economic.

MR. PEREZ: Economic value which is -- which that's how you -- and -- and -- and we'll go through this in his -- in his direct exam. When you -- when you value a cultural asset you have to -- how do you -- value that cultural asset in an economic context. And there are -- because in many other countries and in fact in some cities in the United States there are public assets that are cultural assets. And there is -- you know, there are budget constraints as to how you allocate money.

People have come up with ways of measuring what the value is of keeping a cultural asset or a public asset. And -- and that's what he's going to testify about, Your Honor. And you're --

THE COURT: And it's going to put a value on educational and civic value of this museum?

MR. PEREZ: Your Honor, I'll let the testimony speak for itself. But -- but what the --

THE COURT: He's your witness. I'm asking you, what is he going to say?

MR. PEREZ: He's going to say that based on the tri-county millage, the value to the City of -- the value that the -- that the citizens of the City of Detroit place in -- in keeping the art in Detroit is very small, like $75,000,000.

That's what he's going to say. Based on that -- on that level of support. And based -- based on the analysis that were done and we'll, you know, we'll quibble with Mr. Bennett about whether the methodology was correct or not. We'll have that discussion. But based on the analysis that he did that's in essence what -- what he's going to say.

And -- and, Your Honor --

THE COURT: Why -- why isn't that an analysis that the value of the museum itself is $75,000,000?

MR. PEREZ: Because in somebody else's hands it could be worth a lot more, okay. Because -- because the City of Detroit, that's what the City of Detroit values it. That's the value.

I mean and Your Honor, let's -- let's make sure we understand what the facts are. It's been closed from time to time because of lack of funds. At one time the purse of the -- of the museum was part of the purse of the city, so money

came in. When money came into the DIA it was used to fund things.

I mean we've come to a -- kind of in a rarified form with the DIA subject to the 1997 operating agreement. But -- but before it was just basically run as another department of the city that, you know, money came into the coffers, didn't come into the coffers. And -- and -- and the city arts commission which was founded in -- in 19 -- 1918 basically controlled it. And then back in 1997 or actually a little bit before that, they entered into -- into this agreement.

But to say that the value that -- that I place on something is the intrinsic value in a -- in a -- in a market transaction is just simply not the case. And furthermore, we have real life experience on that.

I mean Mr. Spencer went out and solicited with his -- both hands tied behind his back because we had no cooperation, didn't get cooperation in the first motion, didn't get cooperation in the second motion.

The first motion, I had everyone involved say okay, can we just look at it? No. And -- and you've got -- you've got a loan, I know people don't like loans, but loans are loans. And then you've got, you know, what a hundred and --

THE COURT: Right, right. The trouble with loans is they have to be paid back.

MR. PEREZ: That -- that -- that's -- I once had a

client, Your Honor, a banker who said I don't -- I don't collect loans, I just make them. And -- and you know, but yeah, you got to pay it back. You got to pay it back.

THE COURT: How long did he last in commercial lending?

MR. PEREZ: He was a -- I -- I loved the guy, he was a great guy.

THE COURT: Well, yeah.

MR. PEREZ: He didn't last very long.

THE COURT: He's adorable.

MR. PEREZ: So, Your Honor, you got Juan, 116 pieces. I mean they got -- I know you -- I forget how many they actually showed. They've got like 57,000 of these pieces in hiding for between nine hundred and a billion five. So there is significant market value in them.

And then, and Your Honor, and to some extent I'm -- I'm going to cut a little short because Mr. Kieselstein actually put in some of the -- some of the slides that -- that I had.

But initially, Your Honor, all the art assets were on the table. And when you look at both Bill Nowling's email from May of 2013, when he says all options are on the table. Financial emergencies require extraordinary measures including maybe selling art. I wasn't hired to protect it and neither were you. We have a job to do.

And -- and in the proposal that was made in June of 2013,

basically all -- all of the assets were on the table. And so you -- we kind of fast forward and then all of a sudden there's no assets on the table. The grand -- the grand bargain comes forward and -- and so in essence while the city was -- was giving lip service to the fact that all assets were on the table, in fact they weren't.

And -- and then there was -- as the clip showed, they really didn't explore anything beyond -- beyond the grand bargain. There -- there wasn't any serious -- they -- nobody bothered to call and figure out are these real deals or are they -- are they fake deals. And some of these people contacted the debtor directly. They didn't even come to us.

THE COURT: Let me ask you this hypothetical question. If the city owned the schools that its children were educated in, or if the city owned the libraries and the books in the libraries in the city, would you want those sold and monetized too?

MR. PEREZ: No, Your Honor. And under 436 I think the city draws a distinction between the -- the -- the assets. So -- so you've got state law as well. So under 436 it talks about the -- the -- the assets that you needed for the health, welfare, and safety.

And -- and the schools I would say are -- are clearly welfare. Question and -- and the question is, is the art welfare? I think the answer in this case is no, it is --

THE COURT: How about the libraries? Where do you -- where do we draw the line?

MR. PEREZ: Well, but where do you draw the line on the other side?

THE COURT: No, I'm asking you. Where do you draw the line?

MR. PEREZ: Well --

THE COURT: What about the libraries? Would you sell them too?

MR. PEREZ: I would not sell the libraries. I wouldn't sell the libraries because --

THE COURT: No, but books are what, more important, more significant, more valuable than art?

MR. PEREZ: I -- I don't know what intrinsic value the library has. And let me -- let me step back, okay. When the city --

THE COURT: Assume it had really valuable books in it.

MR. PEREZ: Well, then -- then -- then perhaps, then perhaps. Okay. When the city --

THE COURT: Well, the answer might be yes.

MR. PEREZ: Yeah. So when the city -- let me -- let me -- let me make this point. And the documents show this.

THE COURT: School building happened to be sitting on an oil well. The answer might be yes.

THE COURT: You wouldn't argue that we'll take the children and we'll put them in this other school.

MR. PEREZ: Well, no. I think if the school building -- I think if -- if the school building --

THE COURT: You wouldn't argue that we'll take the children and we'll put them in this other school.

MR. PEREZ: You'd have to argue that, right? And the city would probably have done that, Your Honor. The city probably would have done that.

But let me -- let me make a -- let me make a point because I think this is critical. When the city embarked on this venture and decided to spend money to create the DIA, one of the compelling arguments was that yeah, we're putting this money in there. But these assets are appreciating. That's what they said. These assets are appreciating.

It -- it was looked at as an appreciating asset. I don't think you would ever look at a school except perhaps for -- for the real estate as an appreciating asset. It's the nature of the asset, Your Honor.

THE COURT: Did you client look at the art as an appreciating asset when it did this deal?

MR. PEREZ: Your Honor, I don't -- I don't believe my client looked at the art at all when it did this deal. But that's beside the point.

THE COURT: What does that say about fair and equitable?

MR. PEREZ: It doesn't say a thing about fair and

equitable, Your Honor, it really doesn't. It's -- it -- fair and equitable, we're talking about today. My -- my clients -- I mean we --

THE COURT: It doesn't -- it doesn't bear on reasonable expectations at all?

MR. PEREZ: It bears on reasonable expectations now that we filed for bankruptcy. Reasonable expectations at the time were pursuant to -- to our official statement. And if you look back at the official statement, there is nothing in there that says that there was going to be an invalidity challenge. So there's nothing in there that said anything other than we would be treated exactly as the pension systems which we funded.

I mean that's the irony of the whole thing. They've got a billion five of our cash and -- and we're the bad guys. How could that be? They got a billion five of our cash.

THE COURT: Right. But that's not an issue of what your reasonable expectations might be in the event of a default.

MR. PEREZ: The reasonable expectations in the event of a default were clearly defined within the -- the official statement which was we would be on the same footing as the pensions, as the UAAL.

THE COURT: Which means RJA --

MR. PEREZ: Which means RJA --

THE COURT: Estimates.

MR. PEREZ: Which means -- exactly. But -- but, Your Honor --

THE COURT: It doesn't mean art, does it?

MR. PEREZ: Well, it doesn't mean art in the sense that I don't have a lien on the art. But it does mean that the city has to act prudently. The city has to act prudently.

We're going to show 10, 15 municipal monetizations because cities needed money. That's going to be part of our evidence.

THE COURT: Uh-huh.

MR. PEREZ: Okay. Cities do that.

THE COURT: You mean things that other cities have done in other situations of distress.

MR. PEREZ: Exactly, exactly.

THE COURT: Oh, okay.

MR. PEREZ: Okay. I mean cities do that. Cities sell art. They could sell a hundred pieces and we would all go home happy, except perhaps for Mr. O'Reilly and Mr. Levitt.

So -- so, Your Honor, I mean it was clear that --

THE COURT: A hundred pieces will get you to the 75%, Mr. Kieselstein wants to get for his client?

MR. PEREZ: Probably, probably. Probably would. And we might be even more reasonable than him. So -- we're -- we're the -- we're the --

THE COURT: I think you've been challenged, sir.

MR. PEREZ: We're the more reasonable twin. And, Your Honor, look at the statement. I mean this is -- this is -- this is classic. If they -- if we were in a commercial case, this would be --

THE COURT: Okay. But we're not.

MR. PEREZ: Okay. Yes, now and forever. That's the whole goal of this, to take it away from the creditors yes, now and forever.

If we were doing a fraudulent conveyance, that's all I would have to show. That would be all my evidence. That -- that you're taking it away, you should have sold -- never sold to satisfy claims yes, now and forever.

I would -- I would rest. I would put this on and rest. And I'd probably get a directed verdict. So, Your Honor --

THE COURT: In a commercial case.

MR. PEREZ: In a commercial case. And -- and I'm not sure what's -- what's so -- what's so different here. So -- and Your Honor, so I think as it relates to the -- the fourth prong which is are -- are our interests protected, I think the answer is that is no and I think they fail.

So in closing, Your Honor, I think that the evidence that will be presented will show that the DIA settlement just flat doesn't meet the standards of 9019. It can't be approved. It -- it's the cornerstone of the plan, they repeatedly say it's

the cornerstone of the plan. The cornerstone fails, the plan fails without even getting to Mr. Kieselstein. So thank you, Your Honor.

THE COURT: Thank you, sir.

MR. WAGNER: Your Honor, Jonathan Wagner from Kramer, Levin along with Deb Fish of Allard and Fish. We represent holders of $1,000,000,000 of certificates of participation or COPS.

I have a -- slides which I can hand up in hard copy if you would like. May I?

THE COURT: Thank you.

MR. WAGNER: Your Honor, the first thing you'll note from my opening slide is I was very optimistic September 2nd. But I -- I will -- I did not think I would be opening at 4:00 on the second day, but I will try to be brief. I believe that our -- our brief was actually the -- the shortest brief that was submitted from the objectors.

We will be joining in FGIC's remarks and FGIC's presentation. Our -- our COPS are actually all wrapped by FGIC. And we join in Mr. Kieselstein's remarks. And my role at trial will be limited. I will be focusing on treatment of the COPS vis-a-vis the pension classes and really as Mr. Kieselstein remarked, the size of the pension class -- the size of the pension claims.

It's not accurate as Mr. Bennett claimed, that the level

of discrimination between the COPS and the pension classes is “quite modest” or “extremely small”. In fact the level of discrimination as Mr. Orr mentioned during his deposition and as Your Honor has observed is very significant. This plan does not treat the COPS with even a modicum of fairness.

Now on the face of the plan the level of discrimination is already grossly disparate. The pension classes are getting 59 to 60% and the COPS are getting nominally 10, really less.

But what we will show and what the evidence will show is that the level of discrimination is actually greater. And we will do that by showing that the size of the pension claims is substantially overstated and therefore the recovery to the pension classes is in turn understated and thus the level of discrimination set out in the plan already 50% is understated.

But even if that’s not what the evidence showed, even if we couldn’t show that the pension claims are overstated, the level of discrimination here is already a grossly disparate number. And one can’t contort the Bankruptcy Code to count as a plan that provides for discrimination at this level.

Now it’s hard for the Court -- it’s hard to assess who is right here just reading all the words in the briefs and listening to the openings. And that’s why we have a trial with witnesses. And there have been lots of assertions that have been made by the city in its opening.

But the question is what does the evidence show. Now we

will present one witness during this trial. Mr. William Fornia who is an expert on -- on pension issues.

And he will describe how the pension claim is overstated. But the proof will also come from the city's own witnesses from Mr. Glenn Bowen of Milliman which has been hired as the actuary for the city since the bankruptcy. Mr. Alan Perry who is the city's expert from Milliman on pension issues. And Kim Nicholl who is the retiree committee's expert on pension issues.

Now, there are three main ways -- okay, my -- okay. There are three main ways that the pension claim is inflated and therefore the discrimination level in the -- actually exceeds 50%.

The first is that the city performed the wrong actuarial exercise in calculating the size of the pension claim. According to the plan and disclosure statement at Page 13 and as Mr. Bennett noted in his opening, the city determined the size of the pension claims by calculating something called UAAL, unfunded actuarial accrued liability.

And the amount that the city calculated, and this will be in the documents authored by Milliman is 3.1 billion dollars. Your Honor, the evidence will show that using UAAL was -- was not the right methodology here.

Most notably UAAL ignores that these plans have been frozen. And the only benefits that are owed to retirees in

that scenario, the only benefits to which participants have rights are those benefits that have accrued and vested. And for that under Michigan law, AFT Michigan against State which we cited in our brief, 303 Mich App 651 at 665.

And I also note the Court's eligibility decision at Page 153 in which you noted that -- in which you noted that, "accrued motion benefits" have the status of contractual obligations.

So what the pension experts and witnesses will testify to if they adhere to what they said at their depositions, and I have every expectation they will, is that UAAL includes future benefits that have not yet vested and have not accrued.

And just what UAAL does it is makes actuarial predictions as to what might vest in the future. So you may have an employee who has worked for the city --

THE COURT: Why is vesting significant?

MR. WAGNER: Because that's the only thing that retiree -- that participants are entitled to under the law. That's what the cases say and I believe that's the implication from Your Honor's decision on eligibility.

It's only vested benefits. And in fact, and again this will come out in the evidence, the city's own actuaries agree that when a plan is frozen you don't take into account in assessing the liability, benefits that have not vested and have not accrued. That's from their own mouths.

THE COURT: Well, but you're not equating not vesting and not accruing, are you? Or are you?

MR. WAGNER: I think that certainly benefits that haven't vested haven't accrued. I don't know the -- the nomenclature may be exactly the same. But the bottom line is that there is pretty unanimity amongst the experts who will testify in this place -- in this case that benefits that have not vested, future salary increases that haven't occurred yet, and future wage inflation should not be taken into account in measuring what's owed to the pension classes.

So no matter what nomenclature you use, those three categories should not be taken into account in determining the size of the claim. That I think is very clear.

Now, the second mistake that the city makes is including excess ASF in the size of the claim. And the city's own actuary, Mr. Bowen and indeed Mr. Bennett during his opening acknowledged that the claim includes the excess ASF which is about $387,000,000.

The city also in effect acknowledges in their -- their pension --

THE COURT: I want to be sure I understand what you're arguing here. Is it -- it is your position that whatever incremental impact on an employee's pension would result from the wages that employee would earn next year, whatever that might be, should not be accounted for in UAAL?

MR. WAGNER: Yes. I believe those would be excluded.

THE COURT: And your position is that everyone agrees with that?

MR. WAGNER: You will hear from the pension experts who agree that future salary increases --

THE COURT: I'm not talking about salary increases.

MR. WAGNER: Okay. Then -- then --

THE COURT: I'm talking about what the employee earns next year.

MR. WAGNER: Okay. Then -- then I misunderstood the question. Yes, that can be included. But --

THE COURT: Can be?

MR. WAGNER: Yes, can be.

THE COURT: Should be?

MR. WAGNER: Yes, should be. But future salary increases and future wage inflation should not be included.

THE COURT: And why is that?

MR. WAGNER: Because in a frozen--

THE COURT: Even if they are reasonably foreseeable?

MR. WAGNER: It's not an issue of whether it's reasonably foreseeable. It's an issue of whether it's owed. And those benefits are not owed because the plan is frozen.

Once a plan is frozen, you won't have any future wage inflation. And you won't have any future salary increases.

And you won't have any future vesting. And in fact it's not -- I mean look --

THE COURT: Well, I'm doubly confused now.

MR. WAGNER: Okay.

THE COURT: Let's assume that this employee is not at all vested. They're just not.

MR. WAGNER: Okay.

THE COURT: I don't know when vesting will occur, but it won't occur now and it hasn't occurred by now, and it won't occur within the next calendar year, talking about 2015, okay. Assume all of that.

MR. WAGNER: So that --

THE COURT: Does UAAL include the incremental liability that results from next year's salary?

MR. WAGNER: So what -- if the person passes the vesting point?

THE COURT: No, hasn't.

MR. WAGNER: Then -- then no. I'm sorry, yes it -- I'm sorry, it would include, yes. And it also --

THE COURT: And so why would it include -- why would it include the incremental piece of that, or resulting from that, but not the 2% wage increase this employee is going to get next year?

MR. WAGNER: Because the plan is frozen and under actuarial principals as the experts will say, that's the way

you --

THE COURT: You say frozen. You mean there will be no pension consequence from that 2% COLA this employee is going to get next year? Is that what you mean by frozen?

MR. WAGNER: Yes.

THE COURT: Okay.

MR. WAGNER: I'm sorry to burden the Court with pension issues so late in the day. But we've been living -- we've been --

THE COURT: I doubt it's the hour it's -- it's the result of my block here.

MR. WAGNER: And you'll -- you'll hear -- in any case with respect to ASF the city agrees that ASF is not provided for under the plan. And Mr. Bowen again, this is from Milliman, the actuary for the city, has agreed that benefits that are not permitted under the plan should not be included in the size of the claim.

The last way, Your Honor, in which the size of the claim is inflated is that the plan uses a rate of return that is too low, what we call unconventionally low. And it wasn't -- I think all parties agree about this, but it wasn't quite explained this morning.

But the lower the rate of return, the larger the size of the pension claim. And the reason for that is as a -- as a pension convention, the lower the -- the rate of return is

used as a discount rate as well. So you apply the discount rate to the liability. So the smaller the discount rate, the smaller the effect on the liability.

So the city used a rate of 6.75%. That's below the rate that Milliman actually set for this plan. Milliman looked at this plan, looked at the assets, and came up with a rate of 7.2%.

The 6.75 is predicated on a change in asset mix but that asset distribution hasn't changed and there's really no proof in the record that it will change. The 6.75, Your Honor, is also below the industry average for similar plans by 100 basis points. And you'll hear of a -- of a prominent survey of public pension plans and out of the 120 odd pension plans --

THE COURT: Uh-huh.

` ` MR. WAGNER: -- surveyed, I think we had mentioned this in the brief, only --

THE COURT: How many trillions of dollars are public pension plans behind in UAAL?

MR. WAGNER: I don't know the answer to that, but I think with respect to these plans they're --

THE COURT: Four?

MR. WAGNER: They're -- Your Honor, these -- the evidence will show these plans are no better or worse than other plans. And while we --

THE COURT: What do you -- what do you mean?

MR. WAGNER: In terms of their --

THE COURT: You mean -- you mean our Detroit plans?

MR. WAGNER: Yes, yes. In terms -- comparison to -- to the UAAL of other public pension plans.

THE COURT: Well, but what does that prove? Does it prove anything more than that they're all in trouble?

MR. WAGNER: There are people -- there are observers who say they're in great trouble. There are observers who say they're actually -- that there is no crisis. And look the -- the issue here is --

THE COURT: Have you got one of the latter?

MR. WAGNER: I'm sorry?

THE COURT: Have you got one of the latter?

MR. WAGNER: Yes, we will present him at trial, yes, Mr. Fornia.

THE COURT: Okay.

MR. WAGNER: And I believe the -- I believe you'll hear from the city's experts that they themselves have set rates far higher than the 6.75 for the public plans for which they are actuaries.

And I don't think they are going to claim that those plans are under funded. Every public pension plan on that survey that -- for which Milliman is the actuary, uses a rate over 6.75%.

So I'm -- we -- yes, we will stand by those rates. And

they've also testified that the 6.75 is an outlier. And the retiree committee in its brief has acknowledged that the 6.75 is not based on pension practice and not based on historical returns.

And look, we're not picking a return rate in the abstract. This in effect comes at our expense in terms of the unequal treatment.

Now there are also exclusions from the numerator that Mr. Kieselstein referenced. In -- money from the UTGO settlement, there are restoration of benefits that may occur if the -- if the rate of return is over 6.75%. And we've compiled on one chart an analysis.

If you look at the -- well, just look at the first column. This is DGRS. Under the city's calculation the rate of return is 60%. If you exclude the non-vested benefits, you're up to 66%. If you take out ASF you're up to 85%. And if you exclude, if you use a more conventional rate, 7.2 which is actually what Milliman calculated for this plan, you're up to 96% which in effect means that the plan is -- is properly funded.

Now hemmed in by the statements in the plan --

THE COURT: I -- I need to understand what that 96% represents. What --

MR. WAGNER: That represents the level of funding for this plan.

THE COURT: The level of funding.

MR. WAGNER: Yes. Once you -- once you back out the non-vested benefits ASF and you use a more conventional rate. Now --

THE COURT: And that's without the grand bargain?

MR. WAGNER: Yes. So -- no, that's with the grand bargain.

THE COURT: Oh.

MR. WAGNER: So we've also done the calculation without the grand bargain, not because we agree with that, but because that issue has been raised. And if you just look one, two, three -- at the fourth row, excluding non-vested benefits, we did the -- we did the plan of adjustment without the state contribution, you're at 78%.

And without any grand bargain at all you're at 69%. And then if you go across we have done with the -- with the restoration and then with the return from UTGO. And Mr. Fornia will give more detail concerning this chart.

THE COURT: Okay.

MR. WAGNER: Now, what does the city say in response? The city and the retiree committee. First they say back out the DIA and state contributions.

And -- and you have the information up there. But as Mr. Kieselstein noted, those monies are part of the plan. It's not as if the legislature voted to give money directly to

retirees. The money is being run through the plan and the state is getting a release and the DIA is getting assets. So I don't think that can be backed out.

The second defense that's been raised is that the pension and OPEB classes can somehow be combined. Now the city seems to have dropped that point based on the stipulation that was entered into. The retiree committee is adhering to that position. But there's no case support for that.

The last point that's been raised in defense is the use of the so-called risk free rate or PBGC rate, what Mr. Bennett referenced this morning. That would lead to a -- a wildly inflated pension claim. It's not -- it's far more extreme than what's in the plan and what it would in effect mean that the statements in the plan as to what the retirees are getting are false. And it would also contradict statements that the retiree committee made to retirees to persuade them to vote for the plan.

Mr. Bennett put up charts saying that recovery for PFRS is 9.3% and GRS is 21.9%. And then using the PBGC discount rates 8.6% and 20.7%. Where is that in the plan? Where was that disclosed to people who were voting on this Classes 9 and 10 who are voting on this -- I'm sorry, 10 and 11 who are voting on this plan?

It would also contradict statements that the retiree committee made to retirees to -- to persuade them to vote for

the plan. And this is Exhibit 1043, the letter from the retiree committee to retirees.

It stated with respect to PFRS that retirees, “will receive 100% of your current pension and 45% of your annual escalators or COLAs. Elimination of 55% of your annual escalators or COLAs amounts to a 9.9 reduction in the value of your pension”. Where is the statement that they’re getting 9%?

Same thing with respect to GRS. You -- or, I’m sorry, 20% with respect to PFRS. GRS, you will receive 95.5% of your current pension, but no escalators over your lifetime and you may be subject to ASF recoupment that will be subject to a cap. And then it goes on to quantify the value of losing the COLA 14.5%.

And in the -- Mr. Alberts whose presentation was, you know, quite eloquent trying to quantify the value to retirees, but in the footnotes he set out what in fact the retirees are getting. And in those footnotes, I don’t know if Your Honor still has his slides, for DTRS, I think it was 22%, and PFRS it was 12.7%.

So where is all of this information now when the communications were supposed to made to the retirees as to what they were getting. This is all newfound.

And by the way under this math you could have zero cuts. You could have no cuts in pension and the city would still

show a claim due retirees. That's just not -- that's just nonsensical.

And the city has another problem with respect to this issue akin to the one that Mr. Kieselstein described. And that is that the city's pension expert and also Mr. Bowen disavowed use of the risk free rate. They said it's not appropriate.

And of course it's not appropriate. Nobody uses it. There's not a single pension fund, this evidence is very clear, not a single pension fund, public pension fund in this country uses the risk free rate to calculate funding requirements.

Now they may have arguments why to value a claim it makes some sense. We'll come to those during trial. So there's only one pension expert who is going to give evidence on the risk free rate for the city's side. And that is Kim Nicholl. All of the city's eggs on this issue are in the Kim Nicholl basket.

Your Honor, that's a very leaky basket. Because before this case and before Siegel was paid two and a half million dollars in fees in this matter, she was the leading hawk on not using the risk free rate.

And I'd ask that we put up Exhibit 1043, Page 3. If you could highlight the top for discussions. This is a letter she wrote before this case began to Siegel's client. She works

for Siegel and Company.

For discussions about the likely cost of a public sector plan to a sponsoring employer, or the long term financial health of the plan, NVL, that's risk free rates, estimates will be inaccurate at best and misleading at worse, since these measurements explicitly exclude information about funding and costs. She's the wrong person to be urging use of the risk free rate, Your Honor.

Now just one more point before I close. Mr. Bennett cited the U.S. Air case as a justification for using the risk free rate. He left out something very important about that case. That was a case in which a pension plan was terminating, 303 BR 784 at 786.

The claim arises from the termination of the defined benefit pension plan for the pilots of U.S. Airways. As a result of the termination the liabilities of the plan have been taken over by the PBGC.

Your Honor, a termination is not the same as a frozen plan. There will continue to be investments made by the investment managers of these plans and there are additional requirements that the city must fund in 2023.

The pension experts will say it far better than I can. This is not a termination situation and the considerations are completely different.

Your Honor, when all the dust settles here, the level of

discrimination overwhelms everything else. And, you know, you'd have to have a heart of stone not to sympathize with the retirees. But the COPS would like a fair shake too.

And what's in this plan vis-a-vis the COPS is not fair and not appropriate and can't be squared with the standards in the Code. And maybe a bad plan is better than no plan, but in a legal plan, a plan that violates the Code does nobody here any good.

And because it would set a bad precedent, the plan is also a disservice to any municipality who may in the future face the unhappy prospect of Chapter 9.

Your Honor, I was asked to note that the last COPS objector, Wilmington Trust is on the phone. They represent the contract -- the contract administrator and they'd like to speak for a few minutes now if that's okay with Your Honor.

THE COURT: Sure.

MS. GOING: Good morning, Kristin Going for --

THE COURT: And who is that on the line, please?

MS. GOING: -- the contract administrator.

THE COURT: Oh, yeah, we have the volume turned down. Hold on for us, please. Okay. Who is on the line, please?

MS. GOING: Thank you, Your Honor. Kristin Going, Drinker, Biddle and Reath on behalf of Wilmington Trust as the contract administrator.

THE COURT: Go ahead.

MS. GOING: Your Honor, we just have two points to make. Wilmington Trust is the contract administrator. It is tasked with filing proofs of claim under the contract administration agreement. And we did that. We filed four proofs of claim prior to the bar date.

The two points that I want to make in the opening and we have in fact joined the briefs of both the ad hoc COPS holders and FGIC are that first the disputed COPS claims with regard to the extent that it even exists is insufficient and it's a -- an attempt to adjudicate the COPS claims through this plan confirmation process.

And my second point is that if you look at the actual proposed implementation of the B notes which is set forth in the emergency manager's order number 5, this serves to further the discrimination between the classes and -- and specifically Class 9, the COPS claims holders.

And I want to go through that with you just very briefly because emergency manager order number 5 is really the -- the substance of B note bonds. And what it provides first is that the -- the B note bond issuance cannot exceed $632,000,000.

Now of that $632,000,000 the administrative and other costs relating to those B note bonds are going to be paid from the bond proceeds. So those will come off the top of that $632,000,000.

I can't tell you right now exactly what that amount will be. But it will not be insignificant. And I say that because if you look at for example the DWSD bond transactions that is closing imminently, the -- the administrative costs and the cost of issuance for the 2014 B bonds for instance is nearly $20,000,000. So we're not talking about insignificant sums.

Furthermore, if you go through the -- the bond statute, it provides that on the effective date, Class 12 will receive $450,000,000 of B notes. That's significant because as you know multiple creditors in classes are going to be receiving the B notes, however only Class 12 is going to get a set amount of those B notes.

All other creditors who are entitled under the plan to receive B notes will be sharing in a pro rata share of B notes meaning that the actual amount of B notes that they receive will be dependent on the total amount of allowed claims that ultimately share in the B notes. And as Mr. Malhotra's 40 year projections have stated in footnote A, the final allowed claim amounts for creditors sharing in the B notes may be materially different than the estimates that are set forth in his projections.

Plus Class 12 has what -- what we would call dilution protection where they are going to get $450,000,000 of B notes no matter how many claims are allowed or disallowed that are also receiving the B notes.

And I -- I wanted to point that out and -- and I think you're going to hear more testimony on -- on these issues. But it's -- it's not only the terms of the plan, but it's -- it's the extraneous documents that are implementing the terms of the plan that further the discrimination against Class 9. Thank you, Your Honor.

THE COURT: Thank you. Okay, who is next, please?

MS. QUADROZZI: Good afternoon, Your Honor. Jaye Quadrozzi on behalf of Oakland County.

Your Honor, I would like to introduce -- I have in the courtroom with me this afternoon on behalf of my client, Keith Lerminiaux, the Oakland County corporation counsel.

THE COURT: Welcome, sir.

MS. QUADROZZI: Your Honor, I have a booklet with some demonstratives for you if I may approach.

THE COURT: Sure. Thank you.

MS. QUADROZZI: Your Honor, the city's plan of adjustment features two key restructuring efforts. What has been referred to as the grand bargain and the DWSD pension contribution.

You've heard a great deal over the past couple of days about the grand bargain and you'll be pleased, I think, to hear that I will have nothing to say about that. I'm going to focus on the DWSD pension contribution because the city's plan proposes to take a similarly significant amount from DWSD over

the next nine years.

And that's something that Mr. Bennett yesterday described as one of the highlights of the city's plan. A highlight that allows the city to delay principal payments over the vast majority of the city's remaining debt until the tenth year following the plan confirmation. And that makes way as Mr. Bennett described, for a massive investment program. I want to discuss this afternoon that aspect of the city's plan.

Your Honor, DWSD is critical to the regional economy and the quality of life in this area. It offers vital services to the City of Detroit and on a wholesale basis, most of southeast Michigan. It's one of the largest municipal water and sewage departments in the nation. Its service area covers 1,000 square miles, more than 1,000 square miles and it actually services 40% of the population of the entire State of Michigan.

If the DWSD infra structure were to fail, this could jeopardize essential services such as the safety of the region's drinking water, the availability of water supply and pressure for fire fighting and for commerce. And the environmental health and safety of the region's waterways.

In addition the affordability of water and sewer rates directly impact both household and business budgets and the willingness of residents and of businesses to invest in the area.

So it's easy to see why Oakland County is concerned about DWSD. Oakland County is a party to contracts through which DWSD provides water and sewer services that are relied on by Oakland County's residents and businesses in 62 of the county's townships and villages.

And I want to stop here a minute because to be clear we understand this is not a trial about DWSD or about how to fix DWSD. But the city's plan imposes burdens that will have a significant impact on DWSD. And DWSD is already in trouble and they have been for decades, Your Honor.

So to examine the effect that the city's plan has and will have, it's important -- and to determine if that plan can be confirmed. It's important to look at the current state of DWSD.

Now there's no dispute that DWSD has been in financial distress for many years. They've posted operating losses for each of the last seven years averaging about $200,000,000 a year. That's why in part as a city department DWSD was under the control of the Honorable Judge Cox and the Honorable Judge Feikens before him for some 34 years.

Despite this, the city's plan proposes a ten year financial projection for DWSD that can best be described as wishful thinking. As Oakland County will show during this trial, the revenue, expense, funding, and capital improvement assumptions that underlie the city's plan are severely flawed.

As a result the city will be unable to show that under its plan the essential services that DWSD needs to provide and does provide now, will continue. Because adequate functioning of DWSD is critical for the future success of the city and the confirmation of the plan. The inability to prove that DWSD can provide those adequate services is fatal to confirmation of the plan.

Now the city's flawed projections for DWSD are exacerbated, Your Honor, by the plan's attempt to impermissibly impose non-DWSD expenses on DWSD. And this aspect of the plan Oakland County suggests is a transparent attempt by the city to foist on DWSD customers, particularly those outside the city, including Oakland County, the increased costs that would result from DWSD's increased pension obligations.

In reality w will show that if the plan were to be confirmed, it would force non-Detroit residents who purchase water and sewer services from DWSD, to fund the city's retirement obligations by way of water and sewer rate -- rates and rate increases.

So I want to focus, Your Honor, today on those two arguments. One, is the plan that the city proposes regarding DWSD legal. And two, is it feasible. That is, can DWSD continue to provide the services. And the answers to both of those questions is no.

I want to start with the law first, Your Honor. The city’s plan to take money out of DWSD to fund the general retirement system violates both state and local law. The Detroit City charter provides that monies paid into the city treasury from fees collected shall be used exclusively for the payment of expenses incurred in the provision of those services.

And Michigan Compiled Laws Section 123.1412 provides that the price charged by a city that contracts to sell water outside of its territorial limits shall be at a rate which is based on the actual cost of service determined under the utility basis of rate making.

So that means just what it says. The city may not use DWSD revenues for the purposes that don’t directly benefit DWSD.

Now yesterday Mr. Bennett said that he didn’t think any of the individuals who donated art thought that the art would be sold to pay for, his suggestion was filling potholes, or for any other city services. And I would suggest to you that the same thing can be said for the rate payers.

I don’t think that someone paying their water bills in Pontiac, or in Farmington Hills thought that money could or would be used to pay potholes in the City of Detroit to -- to -- excuse me, to fill potholes in the City of Detroit. And in fact that’s why the law says it can’t.

Now the city argues that all they're doing is having DWSD pay amounts to the general retirement system that DWSD already owes. But the evidence that will be presented at trial, Your Honor, from both fact witnesses, and expert witnesses, and some of which Mr. Wagner presented and I'm not going to repeat all that he said.

But the evidence that we'll overwhelmingly show that the city's assertion that this is money that is already owed is simply not correct.

Now you've heard a lot of testimony about the general retirement system and that it's a pooled system. I'm not going to go into that. But suffice it to say that like it's a long term pension plan and like most pension plans it requires that actuaries regularly adjust the amounts that are necessary to be paid into the plan and that process requires the computation as you've heard of the UAAL.

So I want to just look briefly at the details of the city's plan just so we know the framework in which we're operating. In the city's plan they propose that DWSD will pay $386,000,000 by way of a UAAL. They include a two and a half million dollar -- excuse me, a two and a half million dollar a year administrative fee and a 20,000,000 one time restructuring fee.

They contemplate that that will be paid out over a period of nine years. The first year the payment will be 65.4

million dollars, including that $20,000,000 fee, and in the subsequent years it will be 45.4 million dollars.

During that period of time, Your Honor, no other GRS participating city department will contribute to the GRS through that 2023 time frame. Assets contributed by DWSD during that time frame will be used to satisfy obligations of both DWSD and non-DWSD retirees.

Now the city proposes -- excuse me, the -- the proposed -- the proposal that the city suggests should go out in the years 2015 and 2016 through 2023, vastly exceed the amount that the DWSD has paid in in recent years. And you'll see in the bottom there is simply taken from the city's disclosure statement at 22.

In 2009 in combining water and sewer the DWSD UAAL was 11.5 million. 2010, it was 11.4. 2011, 19.7. 2012, 10.8. And in 2013, 24.2.

So the question is how did the city come up with that UAAL. From day one we will see, Mr. Orr has testified that a key feature of the city's debt restructuring strategy has been to monetize DWSD, to attempt to extract money from DWSD for use by the city in its restructuring plan.

In March of 2013, Mr. Orr will testify -- or has testified that he directed his advisors to look at ways to monetize that system. And those early discussions centered on negotiations with the counties about the creation of a

regional water authority.

Initially -- and these negotiations occurred from that March period all the way through the end of 2013. Initially the city proposed a lease to DWSD -- of DWSD to the counties for an astronomical amount. When that was rejected, negotiations continued and the city came back with a proposal for about $47,000,000 a year.

Now at the same time those regional authority discussions were going on. The city was reaching settlement -- a settlement with the retirees and with the unions. And when the regional authority talks fell through and those fell through in the spring of 2014, the city had to find a different way to fill that hole, to come up with the money that it had agreed with the retirees and the unions that it would need to fulfill the settlement. And the DWSD pension contribution, Your Honor, was the means by which the city chose to fill that hole.

Now you've seen that the UAAL wasn't recommended by the GRS actuary, Gabriel Roeder. It wasn't recommended by the city's actuary, Milliman. Nor did DWSD have anything itself to do with the plan to have the DWSD pay out $428,000,000.

And we know that because that's what the city's witnesses have testified to. Mr. Orr in his deposition when asked about the means by which the 6.7 percentage rate was -- was arrived, question, now you understand that under the plan though the

city and the retirement systems have settled on a 6.75 percentage interest rate, correct? Answer, yes.

Question, and that's -- that number was negotiated between the city and the retiree parties, correct? Answer, yes.

Similarly, Charles Moore, Conway, MacKenzie, the city's expert when asked the 6.75% interest return that is used to calculate the DWSD pension contribution, how was that percentage selected? Answer, that was the product of negotiation.

Question, in essence a settlement between the city and retirees? Answer, yes.

And lastly in her expert report, Martha Kopacz, the Court's expert, testified that the plan of adjustment assumed investment rate of 6.75 was a heavily negotiated component of the plan of adjustment amongst the city, its retirees, the retirement system, the retirement committee, and the labor unions.

Now the city responds again by saying so what, it doesn't matter how we arrived at the number. All the plan of adjustment seeks from DWSD is the amount -- is that they pay their allocable share and that that amount is due and owing right now.

You'll hear expert testimony, Your Honor, that that assertion is simply wrong. That under fundamental actuarial

principals, a UAAL is neither due nor immediately payable. The recognition of a UAAL under actuarial principles is just a means of addressing the unavoidable deviations, both positive and negative of actual experience from the actuarial's assessments. If a UAAL arises it no more warrants a full immediate contribution than a surplus would warrant an immediate refund.

As Gabriel Roeder noted, and this is trial Exhibit 10144, in the general retirement system of Detroit's 75th annual actuarial valuation dated June 30, 2013, and this is at Page E-8.

"Unfunded actuarial accrued liabilities do not represent a bill payable immediately. But it's important that policy makers prevent the amount from becoming unreasonably high and it's vital that there's a sound method for making payments toward them so that they are controlled". So a UAAL is --

THE COURT: Why are they not payable immediately?

MS. QUADROZZI: They're not payable immediately because under sound actuarial principals, the amount is just a calculation going forward of the amount needed to fund. It's similar to a mortgage, Your Honor.

So a homeowner who has $100,000 mortgage owes $100,000. He -- but he owes $100,000 over time. He has -- he pays the mortgager periodic amounts over the length of time.

Now --

THE COURT: Which is what the city wants to do here.

MS. QUADROZZI: The city wants to -- wants to change what is consistent with history, actuarial practice, and common sense, Your Honor. Interestingly the city ordinances relating to --

THE COURT: You're talking about nine years instead of 30 years.

MS. QUADROZZI: Correct, Your Honor. And I -- and I'm also attempting to answer your question about immediately payable.

Because the city ordinances, and this is the Detroit City Code, Section 47-2-18. And they -- that's -- those are the ordinances that govern the GRS, specifically discuss funding the UAAL and they discuss funding it over an amortization period rather than requiring the payment of that recalculated UAAL in full every year.

Now the city also sometimes has referred to the UAAL as a catch up payment. But again, Your Honor, that is simply incorrect. And you will hear expert testimony to that effect.

To call the UAAL catch up payments incorrectly implies that they're overdue or that they should have been paid earlier and that's not the case. The fact is that the DWSD has every year made its calculated UAAL on a 30 year amortization schedule which is what Milliman -- or excuse me, what Gabriel Roeder recommended.

THE COURT: Okay. Then how did it happen that the DWSD portion of the UAAL got to be over $400,000,000 if it's not because somebody miscalculated what the annual payments should be?

MS. QUADROZZI: Well, I think there are two questions -- two answers to that question. First of all, it's not $428,000,000. And I mean --

THE COURT: Whatever it is.

MS. QUADROZZI: There have got to be a UAAL and you will hear testimony about this primarily because of the I'm going to call it one time great recession. Contrary to what you will hear -- what you have heard from the city and read in their pre-trial briefs, it is not the case that there was a systematic purposeful or even negligent under funding. Something that you could have had some blame for.

The fact is and many -- many many plans held this same problem. You had a great recession that resulted in an under funding. But to be clear, Your Honor, the amount is not four hundred twenty-eight, it's not three hundred and eighty-six, and in fact it is significantly less.

THE COURT: Pause -- pause there. We'll get to that. We'll get to that.

So the answer to the question of how did it happen that the UAAL got to be whatever it is, is the recession?

MS. QUADROZZI: Well, I think there are a variety of

answers and I think you'll hear them during the course.

THE COURT: And what else?

MS. QUADROZZI: You will hear the recession. You will hear allegations of mismanagement that include the 13th check that I'm sure Your Honor has heard about. You will hear --

THE COURT: Yes.

MS. QUADROZZI: So -- so there -- there are a variety of different reasons, but I think Oakland County's position when you take a look at the evidence that -- that you hear, the significant causal contribution was the fall in the market that everyone, I don't know, I hated opening my mail, I think everybody suffered from. So something that is not going to happen every other year, but a really bad amount.

THE COURT: We hope.

MS. QUADROZZI: We very much hope. So, Your Honor, we will adduce additional detail about the calculations. But to be clear the assumptions that the city used to generate that number are -- are simply wrong. And by the number of course I'm talking about the UAAL. And they result in the fact that --

THE COURT: All right. Let's get back to -- to the question that I wouldn't let you answer.

MS. QUADROZZI: Okay.

THE COURT: You were going to tell me what you think

the UAAL is.

MS. QUADROZZI: It's a -- it's a complicated question and I --

THE COURT: It's a number.

MS. QUADROZZI: You're going to say oh, my God, it's a lawyer and she's hedging.

THE COURT: It's a number. What's the number?

MS. QUADROZZI: It is a number but there are a lot of factors. I'm going to tell you this. I --

THE COURT: Let's start with the number and then we'll talk about the factors.

MS. QUADROZZI: I think that it is no greater than 188,000,000.

THE COURT: Okay.

MS. QUADROZZI: So there will be a lot of detail about the factors that contribute to that. I'm not going to spend a lot of time going through all of them. But I am going to focus on two that I think are significant.

One that you've heard a little bit about already and that's the 6.75. And the second is the nine year amortization period.

So first let's look at that 6.75. And I thought when I got Mr. Wagner's demonstratives that perhaps he and I were working off the same script. This is very similar to what he presented, but let me go through it quickly.

We know that the 6.75 was not created by actuarial science. We know in fact that in essence the city reverse engineered. It had an amount and they backed into it. It was below the rate developed by Gabriel Roeder, Gabriel Roeder has been the actuary for the plan for -- since inception.

It was below the rate developed by Milliman. You heard Mr. Wagner say that they had recommended just in the November of 2013, 7.2. It was -- it's lower than, and again you heard this 122 of 126 of the public pension funds in the study. And it was below the average rate of return for both the two plans over the last 25 years and below it by 75 basis points.

The discrepancy between the plan's 6.75 and the higher rates, all of those both history and experts tell us is just because it wasn't developed using any actuarial science. It was just plugged.

And the second assumption suffers from the same defects, Your Honor. The nine year amortization period wasn't based on any accounting standard or any actuarial standard. It wasn't based on Milliman's recommendation. It wasn't based on Gabriel Roeder's recommendation. And it was not based on anything that had happened in the past.

The DWSD in the past had paid its amount of UAAL --

THE COURT: Okay. But here's -- here's my problem which I hope you or someone in this trial will address about all of this.

It appears that accepted actuarial science and practice, if that’s what Gabriel Roeder and the plans followed, created a very large, somewhere between 1.5 and 3.5 billion dollar UAAL. Yes?

MS. QUADROZZI: I believe so, although I will have to tell you -- that Your Honor, for the math purposes I’m more comfortable with just the DWSD’s UAAL.

THE COURT: Whatever the UAAL is, it -- it occurred when this actuarial science that you are relying upon was used.

MS. QUADROZZI: That is -- that is correct.

THE COURT: Well, I hate to invoke my mother, but she used to say that just because everyone does it, doesn’t make it right.

MS. QUADROZZI: And -- and -- and that’s -- I’m all for mothers. However, the fact of the matter is, not that there is a UAAL, but that the city is proposing a UAAL that is overstated and nearly everyone that you will hear will testify about that. And --

THE COURT: Using actuarial science, that got us into the hole we’re in now.

MS. QUADROZZI: That’s -- that’s the key. They’re not using actuarial science. They just --

THE COURT: They the -- you mean --

MS. QUADROZZI: I mean the city. The city --

THE COURT: Okay. But what I'm saying is that the experts that you're relying on to say that this rate of return, or this 6.75% is too low, are -- are actuaries science got us into the hole we're in in the first place.

MS. QUADROZZI: And -- and I would agree with you. But I do think that simply because a -- an event or a group of events happened that caused the UAAL to exist does not mean that you do not look to sound methods and practices to try and get out of that difficulty. And the city did not do that, Your Honor.

And I think that in large measure because they have created a UAAL that is based on this -- the incorrect assumption, they have put themselves in a system where they are proposing a plan that purports to do something that is prohibited under law. And for that reason Oakland County objects to that portion of the city's plan.

THE COURT: I guess the -- the broader question I have is, if you have an investment enterprise, whether it's a pension plan or whatever it is that has fiduciary obligations and is therefore obligated to invest as if a prudent person would invest, right?

MS. QUADROZZI: Yes.

THE COURT: Would -- would that kind of an investor on a long range basis which I guess is what we have to look at, be able to -- reasonably expect to achieve 6.75% rate of

return?

MS. QUADROZZI: Yes, and more than that.

THE COURT: And your evidence will support it?

MS. QUADROZZI: And our -- we will -- we will present -- but we will present expert and fact witnesses that will testify to just that, Your Honor.

THE COURT: What's been the rate of return of that kind of an entity for the last five years?

MS. QUADROZZI: The entity --

THE COURT: That I described. With fiduciary obligations and investing according to the standards of a reasonably prudent person.

MS. QUADROZZI: I'm not sure that I have the answer to that question as I'm standing up here, but I --

THE COURT: I have a sense it's nowhere near 6.75%.

MS. QUADROZZI: I don't think that it is under six point -- I do not believe that it is under 6.75%, Your Honor.

THE COURT: Okay.

MS. QUADROZZI: So, Your Honor, I want to turn now to the second of Oakland's objection. And that is based on feasibility.

The city's attempted use of the DWSD assets in this pension obligations and to fill this hole that we've been talking about, is illegal as I've mentioned. But we believe also indefensible in light of the dilapidated state of the

DWSD system.

The evidence that we will adduce at trial will show that DWSD for years has been financially distressed and unable to comply with its regulatory obligations.

THE COURT: And so what would you propose the city do about that?

MS. QUADROZZI: I would propose that what the city do is not rely on the unreasonable projections that it does in the plan of adjustment because first, I think that is a effort to hide the problem. And I -- I think it's a really bad effort to hide the problem because the --

THE COURT: Okay. So I need an answer to my question. But what would you -- what would Oakland County do about that?

MS. QUADROZZI: Oakland County would ask that the $428,000,000 payment not be asked of DWSD and force upon it. So reduce it down to what the actual UAAL is, as I say no more than a hundred and eighty-eight, amortize it out over the similar length of time that it's been amortized over before so the 30 years and take whatever money is available in that system and put it back into that system. Because the system --

THE COURT: How much is that?

MS. QUADROZZI: Off the top of my head, I don't have a figure. But let's take the city's figures. Let's say you

take four hundred and twenty-eight and you take the $45,000,000 a year they propose to do out, and let's just say you even cut it in half. That leaves an additional twenty, $25,000,000 a year that can be put directly back into the system. And my math is -- I'm probably --

THE COURT: It sounds backwards to me.

MS. QUADROZZI: Well, no, it's not. If the amount --

THE COURT: And if you're giving -- if you're giving DWSD less income it has less resources to do the very kinds of expenditures you're asking it to do.

MS. QUADROZZI: Okay. So I'm --

THE COURT: What am I missing?

MS. QUADROZZI: I'm not communicating with you correctly then.

THE COURT: Okay.

MS. QUADROZZI: If DWSD were not asked to -- to give $45,000,000 a year for a inappropriate, we posit, UAAL.

THE COURT: Oh, to pay it to the city.

MS. QUADROZZI: Correct.

THE COURT: Okay, okay.

MS. QUADROZZI: If that amount weren't being taken away, that is a dollar amount, and I just, you know --

THE COURT: That's available for --

MS. QUADROZZI: That's available --

THE COURT: -- for improvements, okay.

MS. QUADROZZI: For improvements.

THE COURT: Okay.

MS. QUADROZZI: So in their pre-trial brief the city cites at length the analysis of Martha Kopacz and the analysis that she reached in terms of the feasibility point.

But -- and her -- and her look at the city plan. But to be clear, and I -- I want to talk this just so we know what we're looking at, Ms. Kopacz did not analyze DWSD at all. In her deposition, and I think this is the second day, so it's August 2nd on Page 521 she was asked, okay, but you made no analysis as to whether or not DWSD after the confirmation will be feasible or viable, isn't that right? Answer, that's correct.

So we don't have the benefit of any work that she did. There has been, however, no shortage of -- of analysis over the years of the difficulties at DWSD and the city has admitted to many of those problems.

Okay. Since we're having trouble with it, okay. DWSD the city admits in their pre-trial order has a long history of failing to comply with EPA requirements under the Clean Water Act. That's from the pre-trial order, Paragraph 54.

The city likewise admits in their pleading, docket number 6644, that there is -- that an acute shortage of resources has been a primary contributing factor to the DWSD difficulties.

Likewise the city admits that the failure to comply with the requirement of its NPDES permit and the ACO which is the administrative consent order entered in the underlying Clean Water Act case, risk DWSD's ability to operate the sewage system for the benefit of the city residents and the other users of the system.

THE COURT: Well, I don't know about two, but one and three has since been resolved. Yes?

MS. QUADROZZI: One and -- one and three have not been resolved, Your Honor. And -- and --

THE COURT: Have --

MS. QUADROZZI: Have not been resolved.

THE COURT: -- not.

MS. QUADROZZI: And -- and let me talk about why that is the case.

THE COURT: I thought Judge Cox determined that there was compliance and released the -- the department from his oversight.

MS. QUADROZZI: Judge Cox determined that there was compliance. He however, issued a -- a number of orders. I'm sure Your Honor is familiar with -- with some of them and we've certainly -- we certainly --

THE COURT: Don't assume that.

MS. QUADROZZI: He issued a number of orders in the context of that case in an effort to solve problems that

existed at DWSD and he retained jurisdiction to enforce those orders.

And let me -- let me take a look at --

THE COURT: Receivership itself was terminated. Yes?

MS. QUADROZZI: That is correct.

THE COURT: Okay.

MS. QUADROZZI: So let's -- let's take a look at Judge Cox's opinion in September of 2011. And this was an opinion Your Honor, that was filed in, as I say September 2011 and the city came to the Judge and said, we are in compliance, we would like you to dismiss that Clean Water Act case. It had been filed in 1977.

And the -- and the Judge back in September of '11 denied their request and said this. For the more than 34 years during which this action has been pending, the city and the DWSD have remained in a recurring cycle wherein the DWSD is cited for serious violations of its NPDES permit, the city and DWSD agree to follow a detailed remedial plan and a compliance, but the DWSD is unable to follow through the plan and is again cited for the same or similar violations.

Although this Court has taken various measures designed to eliminate various impediments to compliance that have been identified by experts and acknowledged by the city, those measures have proven inadequate to achieve sustained

compliance.

Now Judge Cox in that order, and that order is 44 pages long, did some very detailed findings that I think are very instructive and -- and help focus some of the concerns that Oakland County has. In that order he held -- found, that DWSD had human resources issues chronically and had been a problem for 34 years and that included the lack of qualified personnel.

He also found there were --

THE COURT: I have to stop you and ask if you will attempt to show the relevance of these three year old findings here three years later.

MS. QUADROZZI: Yes, I will, Your Honor.

THE COURT: Okay. Then go ahead.

MS. QUADROZZI: He found that there were chronic and serious problems in purchasing and procurement for 34 years. Those included accepted delays, implementing repairs, improvements. And that that adversely impacted operations and impeded preventative maintenance.

Judge Cox also found the failure to comply with environmental obligations in that underlying case. And he found that a failure to replace aged and deteriorated equipment and to maintain facilities was also a root cause of the cycle of non-compliance.

Now, Your Honor, noted correctly that this was three

years ago. However, we will show at trial and introduce evidence that many of these problems still exist today. In fact the city admitted, and we looked at some of those, that the city admitted DWSD still has significant problems and that an acute shortage of resources is part of those problems.

So these facts aren't disputed. In fact Kevyn Orr acknowledged in his deposition that the DWSD's failures in providing services to its citizens was one of the concerns that led the city to file the bankruptcy case.

When asked at the same time -- at the time the city filed for bankruptcy on July 18th, 2013, are you stating that the DWSD was itself was service delivery insolvent? Answer, no. I think -- I think what I'm trying to relay to you, Mr. Neil, is that overall one of the issues confronting the city was the ability to deliver adequate services to its citizens. And DWSD's inability to perform at acceptable levels was included in that concern.

So this is the DWSD that the city is proposing to take $428,000,000 out of. And Mr. Orr said at his deposition something else that Judge Cox noted three years earlier was a problem. So it was a problem three years earlier, and Mr. Orr says it's still a problem.

Question, and do you remember the document that shows over a ten year period that DWSD is able to pay operations and maintenance expenses, pay bond debt on impaired, and fund

capital improvements over a ten year period? Answer, yes, but I believe that was a discussion we were having about steady state and steady state is inadequate. We have capital needs and repair obligations that exceed the steady state. And that's why the city system continues to break down the way it is.

So here's the problem, Your Honor. When you look at the city's projections for the amount that they will spend on capital improvements over the course of the next ten years, you will see that all they're proposing is a continuation of the steady state.

So what Your Honor is looking at here is a chart that we've put together with the amount of money spent on capital improvements down the side and the years running out. You'll see the blue line -- whoops, the blue line is the amount that DWSD budgeted. And the first period I'll look at is just 2004 to 2014.

So from 2004 to 2014, blue line represents the amounts budgeted. The red line represents the amounts actually spent. And the reason I included that line, Your Honor, is because you will see testimony from Bart Foster, a DWSD expert, and consultant who's been working for the system for years that on -- typically speaking DWSD spends about 70% less than -- than what it budgets. So --

THE COURT: And why is that? Why is that?

MS. QUADROZZI: There are a myriad of reasons. I believe some of them included in his testimony were changes to work orders going forward based on the work that was done.

Some of it you will hear testimony from experts has to do with constraints on budget. And some of it just has to do with projects changing, I think. But what I --

THE COURT: All right. Let me ask you to pause for a second.

MS. QUADROZZI: Certainly.

THE COURT: And estimate for me how much longer you'll be because if it's more than five or ten minutes, I'm going to ask that we pick this up again tomorrow morning.

MS. QUADROZZI: I think that it is probably going to be on the nature of 15 minutes.

THE COURT: All right. Let's -- let's pause now and continue in the morning with the balance of this one.

MS. QUADROZZI: Thank you, Your Honor.

THE COURT: All right. So we'll be in recess until 8:30 tomorrow morning.

THE CLERK: All rise. Court is adjourned.

(Court Adjourned at 5:05 p.m.)

We certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/Deborah L. Kremlick, CER-4872 Dated: 9-8-14
Kristel Trionfi
LaShonda Moss